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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-79-831

CROWN CENTRAL PETROLEUM CORPORATION,
Petitioner,
v.
JOHN T. PHILLIPS, JR., CORRADO FRANK TUMMINELLO,
CHARLES PHILIP FREITAG and CARROLL CHARLES MYERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Crown Central Petroleum Corporation (Crown) petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on July 2, 1979.

OPINIONS BELOW

The divided opinion of the Court of Appeals (Pet. App. A, *infra,* pp. 1-36) is reported officially at 602 F.2d 616, and unofficially at 1979-2 Trade Cas. ¶ 62,743. The opinions of the district court on liability (Pet. App. C, *infra,* pp. 38-100) and damages (Pet. App. D, *infra,* pp. 101-137) are reported officially at 395 F. Supp. 735 and 426 F. Supp. 1156, and unofficially at 1975-1 Trade Cas. ¶ 60,335 and 1977-1 Trade Cas. ¶ 61,396.

JURISDICTION

The court of appeals entered judgment on July 2, 1979. A timely petition for rehearing and suggestion for rehearing *en banc* was denied, one judge dissenting, on August 27, 1979 (Pet. App. B, *infra,* p. 37). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The district court found a conspiracy whereby dealers who purchased gasoline from Crown were required to charge artificially high retail prices to consumers, but it also found that there was no illegal agreement as to the wholesale prices charged by Crown and paid by the dealers. Nevertheless, the dealers were held entitled to recover damages measured by the differences between the wholesale prices they were actually charged and the wholesale prices which, it was assumed, they would have been charged if there had been no artificial increase in retail prices. The Court of appeals affirmed these findings and holdings. The question presented is:

Whether, in light of this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), prohibiting the offensive or defensive use of a "passing on" damages theory, gasoline dealers who were charged wholesale prices that were not the object of any price-fixing conspiracy may recover overcharge damages from a gasoline refiner who conspired to fix retail selling prices, on a theory that the wholesale prices paid by the dealers were influenced by the retail prices they charged to consumers.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . .

Section 4 of the Clayton Act, 15 U.S.C. 15, states:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioner Crown is an independent refiner and marketer of gasoline and other oil products which are sold to consumers primarily through dealer-operated stations. Four of its dealers who had been threatened with non-renewal of their leases brought suits for monetary damages and injunctive relief, alleging that Crown had conspired to stabilize both the retail prices for gasoline charged to consumers and the wholesale prices for that gasoline paid by its dealers.[1]

After a trial on liability, the district court concluded that Crown had entered into an unlawful agreement with its competitors to stabilize retail prices, and in furtherance of that agreement, had illegally controlled its dealers' retail prices. *Phillips* v. *Crown Central Petroleum Corp.,* 395 F. Supp. 735, 742, 746, 760 (D. Md. 1975) (Pet. App. C, pp. 46, 54, 83). The court, however, expressly found that "[n]o evidence was produced of similar agreements to fix wholesale prices, and this Court does not find that Crown engaged in a horizontal conspiracy to fix wholesale prices." *Id.* at 757, n. 7 (Pet. App. C, pp. 77, n. 7).

Although the dealers were not purchasers of gasoline at the fixed retail prices, the district court believed they had made a sufficient showing of "a direct causal connection" between the retail price fix and injury to themselves, reasoning that

> Had Crown not engaged in horizontal price-fixing with its competitors, the retail market in the Baltimore metropolitan area would not have been artificially stabilized. Increased competition would undoubtedly have led to lower retail prices and in turn to lower wholesale prices charged by Crown to plaintiffs.

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[1] This conduct allegedly violated § 1 of the Sherman Act, and §§ 4 and 16 of the Clayton Act, 15 U.S.C. 1, 15, 26. Jurisdiction was assumed under 28 U.S.C. 1337. The district court entered a preliminary injunction against the lease terminations, Phillips v. Crown Central Petroleum Corp., 376 F. Supp. 1250 (D. Md. 1973), and permanent injunction, 395 F. Supp. 735 (D. Md. 1975), which was initially vacated, 556 F.2d 702 (4th Cir. 1977), and ultimately affirmed by the court of appeals, 602 F.2d 616, 629-31 (4th Cir. 1979) (Pet. App. A, pp. 21-25; Pet. App. C, pp. 39-40, 100). No issue with regard to the propriety of the injunction is presented here.

Id. at 768 (Pet. App. C., p. 98).[2] It determined the dealers' injury should be measured as the difference between the actual wholesale prices they were charged and the reduced wholesale prices which presumably would have resulted if the retail price had been allowed to drop to competitive levels. *Phillips* v. *Crown Central Petroleum Corp.,* 426 F. Supp. 1156, 1161-62, 1169 (D. Md. 1977) (Pet. App. D, pp. 107-110, 125).[3]

The court of appeals, in approving the overcharge award as the proper measure of damages, concluded it was possible to determine the effect of the artificially high retail prices on the wholesale prices the dealers paid because, under Crown's method for establishing wholesale prices, there was a predetermined relationship between those retail prices and the wholesale prices dealers were charged. Under this method, each retail price increase of one cent resulted in "the dealer's gross profit margin [being] increased one-fourth of one cent while Crown's wholesale price was increased by three-fourths of one cent." Accordingly, the court decided that a wholesale overcharge per gallon could be computed from the illegally fixed retail price, and when multiplied by the gallons of gasoline each dealer sold would constitute the damages suffered. 602 F.2d at 632 (Pet. App. A, pp. 26-27).[4]

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[2] Paradoxically, the district court also based a damage award on the fact that:

> Plaintiffs also suffered injury when they were prohibited from *raising their retail prices* by Crown's illegal vertical agreements. Their property was diminished by their inability to raise prices when they chose to do so, and each plaintiff thus suffered injury.

Id., emphasis supplied.

[3] The district court expressly rejected Crown's argument that awarding damages to a party which had not paid the retail overcharge would subject Crown to possible double liability if, as was the case here, consumer plaintiffs who were the object of the price-fixing conspiracy brought a class action for damages. 426 F. Supp. at 1168, n. 16 (Pet. App. D, p. 123, n. 16); see In re Independent Gasoline Antitrust Litigation, 79 F.R.D. 552 (D. Md. 1978).

Crown had argued that because the district court found only a conspiracy to fix retail prices, which were not charged to the dealers, their recovery could not be based on the retail overcharge but was limited instead to whatever lost profits they could prove. In this connection, Crown had observed that *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968), did not address the right of recovery accruing to a purchaser at a level of distribution different from that at which the price was fixed (Crown Br. at 66-70; Crown Reply Br. at 22-25). Nevertheless, the court of appeals believed that Crown was simply asserting a "pass on" defense, and held that the decision in *Hanover Shoe* required its rejection. 602 F.2d at 633 (Pet. App. A, pp. 28-30).

The court of appeals construed *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 735-36 (1977), as holding that

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[4] In contrast to its approval of "horizontal" damages passed back from the fixed retail price to the wholesale price, the court of appeals found the separate award of "vertical damages" to be "seriously flawed" and "without foundation" in the record. 602 F.2d at 634 (Pet. App. A, p. 30-34). The "vertical damages" were based on the district court's conclusion that Crown's refusal to let its dealers sell at a price *above* the fixed price reduced their profits, and the court of appeals pointed out that this contradicted the basis for the award of overcharge damages. *Id.*

a purchaser who buys at a price which bears some relationship to the fixed price at another level of the distribution chain, can recover overcharge damages if his purchase is made directly from a party to the conspiracy. On that "passing back" basis, it concluded that these dealers were appropriate parties to recover part of the retail overcharge, despite its earlier finding that the dealers had clearly ***benefited*** from the conspiracy:

> Since the higher the price the wider the dealer's margin, each dealer had a substantial incentive to comply with Crown's directions about retail prices, and there was no counter incentive since there was general agreement that maintenance of these prices did not cause a loss of retail sales.

602 F.2d at 632 (Pet. App. A, p. 26-27).

REASONS FOR GRANTING THE WRIT

The court of appeals' decision stands *Illinois Brick* squarely on its head by allowing a purchaser who is only indirectly affected by a fixed price charged elsewhere in the distribution chain to recover a part of the resulting overcharge by "passing back" that overcharge to his concededly unfixed price. Such recovery by the indirectly injured individual is completely at odds with *Illinois Brick's* admonition that only the direct purchaser at the illegal price is a proper party to sue, that such direct purchaser is entitled to the entire overcharge, and that no one else may recover any part of the overcharge even though it indirectly affects the price the other party paid.

As well, the result reached here will create the same policy difficulties that led this Court to fashion the

Illinois Brick rule. The court must perform the difficult and uncertain analysis of tracing the retail overcharge back through the distribution chain and then measuring its impact upon the wholesale price; a substantial risk of double recovery is created since the "passing back" defense would apparently not be available to Crown in suits by direct purchasers at the fixed retail price; and there will be a diminished basis for private enforcement of the antitrust laws since the recovering party normally will have little incentive to bring suit because he benefits by receiving the fixed retail price.[5] 431 U.S. at 729-47.

Clearly, such a substantial departure from the holding of and policies behind *Hanover Shoe* and *Illinois Brick* warrants review by the Court. Given the frequency of resale price maintenance schemes, the right of a middleman in the distribution system, who comes between the price-fixing manufacturer or distributor and the party who pays the overcharge directly, to a portion of the illegal overcharge is an important and recurring one. *Illinois Brick* suggests that recovery in circumstances similar to that here should be barred (431 U.S. 736, n. 16), and this case is an appropriate one to recognize that fact. Moreover, insofar as the court of appeals' decision permits recovery by a party dealing directly with the price-fixer and bars recovery by the other parties who actually paid the full amount of the illegal overcharge, it is flatly in conflict with several decisions allowing such purchasers to recover.

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[5] The dealers here brought suit only because of the happenstance that they were threatened with termination of their leases, and the principal focus of the case in its initial stages was injunctive relief to prevent these terminations.

1. This Court held in *Illinois Brick* that, regardless of whether their prices were affected by the price-fixing scheme, indirect purchasers were not entitled to sue for a portion of the illegal overcharge passed on to them. Instead, only "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is a party 'injured in his business or property' . . ." and thereby entitled to recover the full amount of the overcharge. 431 U.S. at 729.

Although *Illinois Brick* and *Hanover Shoe* each involved a factual situation in which the conspirators who fixed the prices also were the parties who made the sales at those prices, with the consequence that only a party purchasing directly from members of the conspiracy could qualify as "the overcharged direct purchaser", this does not justify a conclusion that this Court was establishing a rule restricting recovery to purchasers in privity with a conspirator, rather than a policy of broader applicability.[6] Clearly, the party who purchases at the fixed price satisfies the policy concerns (see below) that were the basis for *Illinois Brick,* regardless of whether he purchased from a member of the conspiracy or from a seller who had been compelled by the conspirators to charge the higher price. *Cf.* 431 U.S. at 736, n. 16. The fact that the purpose of the conspiracy is to fix prices charged by sellers who are not members of the conspiracy does not affect in any way either the nature of the injury suffered by the purchaser who pays the fixed price or the relative ease of computing such purchaser's damages. On the other hand, construction of the term "overcharged direct purchaser" as meaning only the purchaser who buys from a member of the conspiracy, rather than the purchaser who buys at the fixed price, without regard to who is the seller, leads to a direct conflict with the policy concerns expressed in *Illinois Brick.*

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[6] Significantly, much of the criticism of *Illinois Brick* proceeds directly from the incorrect assumption that a rule of privity was established there. For example, the Majority Report accompanying S. 300, the Senate Bill that would reverse *Illinois Brick*, clearly expressed such an understanding:

> Subsection 4I(1) explicitly overrules the holding of *Illinois Brick Co.* v. *Illinois*, *supra*, by removing the artificial requisite of "privity" between the plaintiff and the defendant in an antitrust action.

S. Rep. No. 96-239, 96th Cong., 1st Sess. 34 (1979). Many commentators have pointed out that such a rigid "privity" rule does not properly serve the policies underlying either Section 4 of the Clayton Act or *Illinois Brick* itself in all factual contexts. *See, e.g.*, Comment, *Congressional Authorization of Indirect Purchaser Treble Damage Claims: The Illinois Brick Wall Crumbles*, 47 Fordham L. Rev. 1025 (1979).

It is submitted that *Illinois Brick* establishes a rule of policy which permits recovery by the party who suffers the direct injury by first paying the illegally fixed price, and bars recovery by those who are injured indirectly by the incidental effects of that illegal price on other prices. A party who purchases directly from a member of the conspiracy, but who does not pay the illegal price, is only injured indirectly and therefore is not entitled to share in the recovery any more than the indirectly injured plaintiffs in *Illinois Brick* were entitled to a share.

The court of appeals' decision allowing recovery here not only conflicts with the rationale of *Illinois Brick* but is inconsistent with other lower court decisions recognizing that *Illinois Brick* extends beyond the particular facts of that case. The Third Circuit has

permitted recovery of an overcharge by a plaintiff who did not purchase directly from a member of the conspiracy but instead purchased from a wholly-owned subsidiary of one of the members. *In re Sugar Industry Antitrust Litigation,* 579 F.2d 13, 18-19 (3d Cir. 1978). ("To adopt any other view would invite evasion" of the antitrust laws.) Subsequently, the same court held that a purchaser from a subsidiary could recover for the overcharge when it can "establish facts that warrant holding [the parent] legally accountable for [the subsidiary's] activities in that as a consequence of [the parent's] domination, the subsidiary's prices were determined in accordance with the general price-fixing conspiracy." *Mid-West Paper Products Co.* v. *Continental Group, Inc.,* 596 F.2d 563, 589 (3rd Cir. 1979);[7] *Cf. The Hecht Co.* v. *Southern Union Co.,* 1979-1 Trade Cas. ¶ 62,647 at 77,655 (D. N.M. 1979); *Florida Power Corp.* v. *Granlund,* 78 F.R.D. 441, 443-4 (M.D. Fla. 1978).

These decisions simply cannot be reconciled with the approach adopted by the Fourth Circuit. The plaintiff-dealers here, though purchasing directly from Crown, were not charged the fixed retail price, and instead only paid wholesale prices which were influenced by the fixed retail price. These plaintiff-dealers resold at the fixed retail price, as required by Crown, and it was their customers who paid the full amount of the illegal overcharge. The court of appeals, however, misconstrued the "direct purchaser" language of *Illinois Brick* to mean that only a party who purchased directly at the price fixed by the conspiracy was entitled to recover. This error—allowing the dealers to recover on the basis of the retail overcharge they did not pay —required tracing the effect of the retail price fix to the wholesale prices paid by the dealers as the means of determining how much of the overcharge was "passed back" to them, the very problem that led this Court to fashion the rule of *Illinois Brick.*

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[7] *See also* In re Fine Paper Antitrust Litigation, 82 F.R.D. 143, 153 (E.D. Pa. 1979) ("[T]he existence of defendant-owned subsidiaries and the participation by those subsidiaries in an overall horizontal conspiracy among mill defendants may be relevant to the determination of whether purchasers from those subsidiaries are direct purchasers for purposes of inclusion in the nationwide direct purchaser class . . .").

2. This decision permitting recovery by a dealer who was not the purchaser at the illegally fixed price nullifies the policies on which *Illinois Brick* expressly rests.

First, it was this Court's perception there and in *Hanover Shoe* that there would be substantial "uncertainties and difficulties in analyzing price and out-put decisions 'in the real economic world rather than an economists' hypothetical model' ", so that "the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the Courtroom" were unacceptable. 431 U.S. at 732, 737, 741-743. The difficulties of tracing the effect of retail prices "passed back" to some impact earlier in the distribution chain, as here, are no less than those involved in determining how much of an impact was "passed on" in *Illinois Brick.*

Nevertheless, the court of appeals approved a tracing backward from the retail overcharge to a presumed wholesale overcharge based upon a relationship between retail and wholesale price increases during the conspiracy period. This approach required the assumptions that this fixed relationship would not have existed in the absence of the conspiracy and that, except for the conspiracy, a dealer who charged a higher retail price would have been charged the same wholesale price as a dealer who charged a lower retail price, an assumption not shown to be true. In any event, this type of economic assumption is precisely the sort of analysis which *Illinois Brick* eschewed.

Second, this Court decided in *Illinois Brick* to forbid the use of "pass-on" theories because the alternative, allowing parties other than the directly overcharged purchaser to recover, raised "the possibility of inconsistent judgments obtained by conflicting claimants . . ." 431 U.S. at 737, n. 18. Now the court of appeals, by approving a "passing back" of the retail overcharge, has resurrected the possibility of inconsistent judgments. Another court, faced with a suit by the dealers' customers against Crown, could easily conclude that those customers, the direct purchasers at the fixed price, were entitled to recover the full amount of the retail overcharge which they unquestionably paid. *See Gas-A-Tron of Arizona* v. *American Oil Co.,* 1977-2 Trade Cas. ¶ 61,789 at 73,245 (D. Ariz. 1977). Crown would have no assurance that it could use the "pass back" defensively in such a suit to reduce the customers' recovery from it. The court of appeals decision, therefore, exposes Crown to the possibility of being held liable for the same overcharge to both the dealers and their customers, "a serious risk of multiple liability" for Crown which *Illinois Brick* sought to avoid. 431 U.S. 730.[8]

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[8] There is a related difficulty with the court of appeals' approach. Offensive use of a passing-back theory was expressly permitted to demonstrate and measure the effect of the overcharge on the dealers' wholesale prices. Yet, disregarding the

Third, this Court believed that allowing suits by direct purchasers who could recover the full amount of the overcharge best served "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws." 431 U.S. at 745. Disregarding this policy, the court of appeals has actually weakened private antitrust enforcement by allowing the dealers to recover on the basis of the retail overcharge. Assuming that the court of appeals would not countenance multiple liability for Crown, the dealers' customers have been removed as potential plaintiffs. Yet the dealers, the only parties who can recover for the overcharge, have little incentive to sue unless their dealerships are in danger of being terminated, because their profit margins are augmented by the conspiracy. Moreover, the dealers cannot recover the entire retail overcharge, since only part (3/4) can be traced back to their wholesale price.

Finally, the court of appeals' decision is difficult to reconcile in light of its assumption that retail sales remained constant despite the higher fixed price. 602 F.2d at 632 (Pet. App. A, pp. 26-27). Since the dealers shared in the increased prices their total profits were higher under the conspiracy than they would have been under competitive conditions. To award the dealers substantial damages under these circumstances is

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clear directive of *Illinois Brick* that "pass-on" type theories must be available for both offensive and defensive use, the court did not allow Crown to use the same methodology to contest whether the dealers had suffered any injury. Such a ruling is patently unfair, especially in this case where the court of appeals observed that a pass-on of any wholesale overcharge was "insisted on" by Crown and the dealers' own damages proof assumed no loss of gallonage from the alleged conspiracy. 602 F.2d at 632, 633 (Pet. App. A, pp. 26-27, 28).

to ignore the language of Clayton Act § 4, which requires that a person "be injured in his business or property" to recover. *See, e.g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486-87 (1977); *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 748-49 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

In contrast to the adverse effect on *Illinois Brick* policies which results from the court of appeals' decision, these policies are furthered if the parties who actually paid the illegally fixed price, rather than these middleman dealers, are deemed the appropriate parties to recover the overcharge.[9] The customers would be entitled to recover the entire amount of the overcharge, so "the amount of the recovery would reflect the actual injury suffered" and there would be no need for complex tracing and allocation procedures. They would thus have the strongest incentive to sue, along with any dealers threatened with termination for noncompliance with the illegal scheme. Consequently, there would be two groups of potential plaintiffs, together able to recover for all the harm flowing from the conspiracy, but without the danger of multiple liability.

3. This is an appropriate case to resolve the reach of *Illinois Brick* in circumstances where, unlike that case and *Hanover Shoe,* the party which dealt directly with the conspirator was only indirectly injured (if at all), while the directly injured party did not purchase from the defendant. We submit that the court of appeals, through "[u]ndue emphasis on privity", has awarded damages based on the retail overcharge to the

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[9] While the dealers should still be permitted to recover damages in the amount of their lost profits due to the conspiracy, it was undisputed in this case that there were no such losses.

wrong party,[10] and in so doing, has violated virtually every important precept of *Illinois Brick,* which should apply here despite the slightly different factual context of this case.[11]

In particular, this case involves a factual situation which is recurrent: resale price maintenance where the resale price is fixed by the reseller's supplier. If (as the court of appeals concluded) the reseller is the proper party to bring suit, those customers who actually paid the fixed price will presumably be left without a remedy. The "result would be a loophole in the antitrust laws that would provide immunity for any price-fixing manufacturer which, for whatever reasons, finds it useful to conspire to fix prices" with its resellers. *Florida Power Corp.* v. *Granlund, supra,* 78 F.R.D. at 444.

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[10] See 2 Areeda & Turner, *Antitrust Law* § 334c at 165 (1978).

[11] The dealers were permitted to recover, based on a complicated "passing back" calculation, without making any showing that they suffered injury as a result of the conspiracy and in the face of their concession that they benefited from the conspiracy. The dealers' customers, who were clearly injured in the full amount of the overcharge and have a strong incentive to sue, would apparently be barred from recovery unless Crown is to be exposed to multiple liability. Crown may be subject to multiple liability in any event, if another court decides the dealers' customers can recover the overcharge, since Crown cannot use the "trace back" defensively. Even if multiple liability could be completely avoided by tracing and allocating the retail overcharge, such a procedure is precisely what *Illinois Brick* was designed to avoid.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 26, 1979

APPENDIX

APPENDIX A

United States Court of Appeals,
Fourth Circuit.

Nos. 77-1780, 78-1078.

John T. Phillips, Jr., Corrado Frank Tumminello,
Charles Philip Freitag, and Carroll Charles Myers,
Plaintiffs-Appellees,

v.

Crown Central Petroleum Corporation,
Defendant-Appellant.

Argued Oct. 2, 1978.

Decided July 2, 1979.

Before Haynsworth, *Chief Judge,* Cowen,[*] *Senior Judge,* and Widener, *Circuit Judge.*

Cowen, *Senior Judge*:

Defendant Crown Central Petroleum Corporation (Crown), is an independent wholesaler of gasoline and other oil products in the Maryland marketing area. Plaintiffs are four of Crown's independent dealers. The plaintiffs brought private antitrust actions against Crown, charging violations of 15 U.S.C. §§ 1, 15, and 26 (§ 1 of the Sherman Act, and §§ 4 and 16 of the Clayton Act). The complaints alleged that Crown entered into a horizontal conspiracy with its competitors to stabilize the retail price of gasoline in Maryland; that Crown forced its independent dealers into a vertical price-fixing agreement to control the retail price of gasoline; that Crown entered into tying agreements with its dealers which required that only Crown brands of motor oil could be sold, and that these conspiracies and agreements supported and reinforced each other to create an elaborate and pervasively illegal system of reducing competition and restraining trade in the Maryland gasoline market. After a trial, the district court found Crown liable on most of these charges and issued an injunction which required the defendant to enter into new 3-year leases with each of the plaintiffs and forbade Crown from cancelling the leases (or refusing to renew them) for any retaliatory or illegal reason. The determination of money damages was reserved for a separate trial.

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[*] Wilson Cowen, Senior Judge of the Court of Claims, sitting by designation.

Three days after the permanent injunction issued, the attorney for the plaintiffs notified the court that one plaintiff, Corrado Frank Tumminello, had committed perjury, both in pretrial proceedings and during the course of the trial. Tumminello had also fabricated business records to support his perjured testimony. Crown moved for various forms of relief based on the discovery of perjury; but the district court, after considering the motions and the evidence, reaffirmed all of its previous actions except the permanent injunction (which was vacated with respect to Tumminello to protect "the integrity of the court" and otherwise continued) and one finding of fact (which was stricken). Crown appealed to this court all of the district court's rulings in favor of the plaintiffs.

While this appeal was pending, the district court held a separate trial to determine the quantum of money damages. On February 17, 1977, the court awarded plaintiffs total treble damages of $434,310 and attorneys' fees of $200,000. *Phillips v. Crown Central Petroleum Corp.,* 426 F.Supp. 1156 (D.Md.1977). An appeal from the damage award followed.

In *Phillips v. Crown Central Petroleum Corp.,* 556 F.2d 702 (4th Cir. 1977), we vacated the permanent injunction without prejudice and remanded the case to the district court with instructions to hold a hearing regarding the extent of Tumminello's perjury. Consideration of all the other issues on appeal was stayed pending the outcome of this hearing, which was held on July 22, 1977. After the hearing the district court struck some of its findings of fact, but reaffirmed its previous decision in all important respects. Crown now appeals against to this court, challenging the manner in which the remand hearing was conducted and renewing its appeals on all the previous rulings of the district court.

I. The Remand Hearing

We turn first to the objections raised by the defendant to the proceedings on remand from the original appeal. To understand the posture of this aspect of the case, some factual background is necessary.

Plaintiff Tumminello testified at trial and in pretrial proceedings to several events which tended to prove the existence of a horizontal conspiracy among Crown and its competitors to fix prices. According to his testimony, he had on at least four occasions refused to raise his retail gasoline price when instructed to do so by Crown representatives. Those representatives told him at those times that he had to raise his price because his delay was "screwing up the arrangement" with the other oil companies. This testimony formed the basis for several of the district court's findings of fact.

After the first permanent injunction issued, an accountant examining Tumminello's business records was unable to square the written account books with Tumminello's story of one of the episodes described above (the one alleged to have taken place on April 24, 1971). Tumminello finally admitted to his counsel that he had lied about the incident; destroyed the genuine business records for that day, and fabricated new records that would support his false story. He continued to stand by his other testimony.

The defendant filed motions pursuant to Rules 52(b), 59(a), and 60(b) of the Federal Rules of Civil Procedure, asking the court to dismiss all of the claims of every plaintiff, or to grant a new trial or other extensive discretionary relief. The district court simply struck the finding of fact which dealt with the spurious incident and reaffirmed its judgment in all other respects. On appeal from this decision, we stayed consideration of the merits of the case until the district court could conduct a "plenary hearing," "reappraise the case," and then determine the appropriate findings and conclusions. *Phillips v. Crown Central Petroleum Corp., supra*, 556 F.2d at 705. By so doing we intimated no view on the soundness of the conclusion reached by the district court (a finding that the perjury was limited and did not infect large areas of the case); we simply instructed the court to hear Tumminello *ore tenus* and receive such other evidence as might be required to assess the full impact of the perjury on the case as it stood.

The remand hearing took place July 22, 1977. Prior thereto Crown took a 2-day deposition of Tumminello and this was offered in evidence. However, Crown had previously indicated that it did not intend to call Tumminello to testify but would rely instead on his deposition. In view of the explicit directions from this court, the district court directed plaintiff to call Tumminello, who testified and was cross-examined extensively in open court by Crown. Crown also called as a witness, Mr. Barry Owens, an employee of Crown's counsel, who had performed the analysis of Tumminello's records. Crown introduced exhibits and a deposition in testimony. The trial court denied the requests of both parties to call a large number of witnesses on the issue of horizontal price fixing on the ground that such action would transform the remand hearing into a new trial. The trial judge also denied Crown's request to recall to the stand several of Crown's witnesses who had testified in the 1974 trial, plus another witness, James C. Blackman, who had testified previously only by deposition. The court concluded that the hearing of such testimony was not required by our order. In an opinion filed August 19, 1977, the district court denied all of Crown's post-trial motions and reaffirmed the court's former findings and conclusions, except for two findings of fact which were stricken in view of the testimony given at the remand hearing.

The defendant raises several objections to the conduct of the remand proceedings. Most of them can be traced to a disagreement over the precise nature of the hearing contemplated by this court when we issued the remand order. The district court enunciated in this way the question to be answered at the hearing:

> The question ultimately presented at the remand hearing was essentially a narrow one, namely, whether Tumminello is now telling the truth or whether he is now lying in confirming on the stand under oath substantially all his prior testimony. * * *

The defendant argues that this approach is somehow inconsistent with our instruction to "reappraise the case and * * * determine the appropriate findings and conclusions" in light of the evidence adduced at the hearing. We do not agree. The difficulty we found with the case on the first appeal was that the trial judge had not heard testimony from Tumminello since the disclosure of his perjury and it was uncertain how pervasive his perjury may have been. Therefore, we were reluctant to affirm findings of fact based, in part at least, on the testimony of an admitted perjurer until Tumminello was examined *ore tenus* and the district court had an opportunity to reassess his testimony.

On review, we find that the purpose of the remand order was fulfilled to the extent that no reversal is required on account of the conduct of the remand hearing. The trial court's refusal to again hear four Crown witnesses who were implicated in varying degrees by Tumminello's testimony was not error, since the district court had previously found their testimony uncorroborated, and since only one of them, John W. Conway, was involved in the particular incident which Tumminello admitted he had fabricated. To put it in another way, the district court would have been required to hear these witnesses again only if Tumminello's perjury extended into areas other than those covered by his frank admission. Since the trial judge decided that the remainder of Tumminello's testimony was credible, he had no need to rehear the testimony of these witnesses.[1]

Taking a slightly different tack, Crown argues that on remand the district court should have applied the maxim *falsus in uno, falsus in omnibus,* reinforced by the judicially enunciated observation that "intentional falsification of material records presumptively destroys the weight of the offender's evidence as to the entire case." *Gratsos v. Moise Bay,* 287 F.2d 706, 707 (4th Cir. 1961). Crown argues that the testimony which Tumminello admitted was false differed in no material respect from much of his other testimony, and that therefore all of that other testimony should be regarded as suspect until corroborated. Even if we were inclined to utilize the maxim cited above, which this court has at various times labeled "worthless," [*Virginia Ry. Co. v. Armentrout,* 166 F.2d 400, 406 (4th Cir. 1948)], "inappropriate," [*United States v. Harris,* 346 F.2d 182, 185 (4th Cir. 1965)], and "always treacherous," [*Phillips v. Crown Central Petroleum Corp., supra,* 556 F.2d at 705], we would not adopt the defendant's reasoning, since the maxim has always been purely informatory, never mandatory. *Norfolk and Western Ry. Co. v. McKenzie,* 116 F.2d 632, 635 (6th Cir. 1941). The district court *could have* decided, on the basis of Tumminello's perjury, that he was unworthy of belief on other points as well. The court did not choose to do so, and we cannot say on the record before us that the refusal was error. The court found the rest of Tumminello's testimony to be substantiated and corroborated by other evidence of record, and we conclude that Crown has failed to show that the district court's findings on these issues are clearly erroneous.

Crown's other objections to the conduct of the remand hearing—that it was scheduled at a time inconvenient to Crown's counsel, that prehearing discovery was not as extensive as it might have been, and that the videotape of Tumminello's remand deposition should have been received in evidence—all pertain to maters traditionally left to the trial judge's informed discretion, and we decline to disturb such rulings absent a showing of abuse. That showing was not made here.

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[1] Crown argues strenuously that the district court erred in refusing to hear in open court the testimony of James C. Blackman, one of the witnesses Crown wished to call at the remand hearing to refute Tumminello's testimony. Blackman testified at the trial only by deposition, and the trial judge never had an opportunity to observe his demeanor on the stand. But the conflict between Tumminello and Blackman was very limited, and may have been nonexistent. Tumminello testified that on some occasions Blackman told him that pricing arrangements had been made with the other independent oil companies. Blackman denied making those statements. The only evidence of the statements other than Tumminello's direct testimony was a notation made by him after a telephone call with Blackman, which recorded that Blackman had told him that "everybody is going up." Tumminello later admitted that he would interpret such a statement to mean that there was a pricing agreement with competiors, so both witnesses may have been telling the truth. Furthermore, Blackman's supposed conflict with Tumminello closely resembled the conflicts between Tumminello and several other Crown witnesses who gave live testimony; the trial judge gave no credence to the testimony of any of those witnesses, and there is no reason to believe that one more witness repeating the same tale would have any further effect on the judge's determination of credibility. Finally, Crown could have presented Blackman in person at the first trial as a witness if his testimony on this point had been as important as Crown now claims it was. For all these reasons, we are persuaded that although the trial judge might have been wiser to hear Blackman in person, he did not commit reversible error by refusing to do so.

II. The Horizontal Price-fixing Findings

Since we find that no reversible error was committed in the conduct of the remand hearing, the remaining issues must be decided on the record as finally reaffirmed by the trial judge after that proceeding. We have reviewed that ample record, assisted by able briefs from counsel for both sides, and we find therein sufficient evidence to support the trial judge's findings that a horizontal conspiracy to fix prices existed and that Crown participated in that conspiracy.

Several employees and officers of Crown testified to telephone calls between Crown and its competitors; the subject of those calls was retail pricing. Wilbur Pressler, Crown's Manager of Administration (Marketing), testified that he called Ashland Oil and Refining Company and Meadville Oil Company about the retail prices being charged by some of those companies' gas stations, because those stations "were engaged in price competition that could seriously affect sales of the Crown station" near them. Pressler came close to admitting that his motive for making those calls was to stop the price competition among the retail gas stations concerned. Pressler also testified that he received phone calls from the Society of Independent Gasoline Marketers of America (SIGMA) concerning future retail price moves in the Maryland gasoline market. Pressler believed these calls to be "improper," and testified that he did not encourage SIGMA, but the calls continued. Crown itself was not a member of SIGMA. Archie Garrison, who was Pressler's predecessor as Manager of Administration, also admitted that he made telephone calls to competitors to discuss retail prices being charged by particular gas stations. Garrison called Hess Oil Company when Hess stations were hurting Crown sales by posting lower prices, asking Hess officials to "look into it." James C. Blackman, Crown's Mid-Atlantic Regional Office Manager, acknowledged that he had called officers of Petroleum Marketing Corporation (PMC), another Crown competitor, asking them when PMC was planning to change its retail prices. Joseph J. Gilboy, Crown's Virginia District Manager, testified that he had received calls from PMC, asking him to raise Crown's retail gasoline prices and informing him in advance of PMC's price moves. When asked whether he returned calls to PMC, Gilboy equivocated. Telephone records confirm the placing of calls between Crown and each of the competitors mentioned here.

These calls were verified by the testimony of the officers of the competitors who participated in them. Irving Grossman, Price Coordinator for Hess, testified that he received calls from Crown and other oil companies informing him of prospective retail pricing actions, and understood these calls to be explanations of those actions. Henry R. Wainwright, Vice President of PMC, admitted that he made calls to the other oil companies to discuss future price moves and stated specifically that he talked to John W. Conway of Crown about pricing in the Maryland area.

Other evidence in the record lends support to the district court's findings. Tumminello's testimony (which was found credible by the trial judge) that officers of Crown had told him of an agreement with the other oil companies is corroborated by the testimony of Earl Burch, a Crown sales representative, who stated that he also received this information from his superiors at Crown. On several occasions, Blackman was able to predict the day and hour of competitors' price changes, since he sent field agents to watch other gas stations to see whether the price changed when he thought it would. Blackman's explanation for his prescience was that his knowledge was "based on compepetition in the area, what we had seen * * *." Finally, there was the testimony of Howard Knox. We have reserved discussion of Knox's testimony to the end of this review of the evidence, because it is vigorously assailed by Crown.

Howard Knox was Administrative Aide and secretary to two vice presidents of PMC, Wainwright and Ferguson. Knox testified that the vice presidents for whom he worked called all the independent dealers, including Crown, just before a planned price hike to find out whether the other dealers were going to "go along" with it. He was in a position to hear the officers actually speaking with the other conspirators. These telephone calls took place during 1970 and 1971, while Knox was working for PMC. Knox himself took some messages from other independents to relay to his superiors, and he testified that he took such a message from Crown. Knox stated that he called Crown himself "six or seven times" to advise Crown of proposed changes in gasoline prices. The district court, in finding the existence of a horizontal conspiracy, accorded "particular weight" to Knox's testimony.

Crown attacks Knox's testimony on several grounds. First, no particular dates for any of the phone calls Knox described were given, nor could Knox recall the details (as opposed to general tenor) of the price-fixing communications. Crown also suggests that Knox had a "bone to pick" with one of his superiors at PMC, implying that he had a strong motive to fabricate damaging testimony. Both of these objections, however, relate to the credibility of the witness, and the district court resolved them adversely to Crown. In the light of the whole record, we decline to upset the trial judge's resolution of these issues.

Crown's frontal attack on Knox is based on his subsequent testimony in other proceedings, particularly a deposition taken in a subsequent civil action against PMC. Counsel for Crown attended the deposition and participated in the cross-examination, apparently for the purpose of discrediting Knox and obtaining ammunition to use in the present proceeding. Four salient points emerge from this deposition:

1. In his testimony before the trial judge in the present case, Knox said that he had no ill feelings at all toward any representative of PMC. In his deposition, he admitted that he had ill feelings toward Mr. Ralls of PMC. To that extent, his testimony before the district court in the present case was false.

2. Knox was confronted at the deposition with telephone records and company price-changing records for the periods of time he was employed by PMC and was unable to correlate particular price changes with particular telephone calls to competitors. The strong implication, according to Crown's counsel, was that such a correlation was impossible, but without the records before us we cannot resolve the question.

3. Knox testified before the district court in the present case that he telephoned Crown to suggest price changes and that Crown representatives would later call him back to give their assent. In his deposition he admitted that, many times, the assent would be given in the same conversation. To that extent, his testimony before the district court in this case conflicted with the deposition.

4. Knox stoutly reaffirmed in his deposition that the calls he described actually took place largely as he had explained them in this case.

The district court ruled that the deposition evidence was not properly a part of the record before him and refused to consider it. The court also found that even if the deposition were admitted "it would not affect the weight which this Court has accorded the trial testimony of the witness Knox." We are disposed to agree with the district court's ruling [*cf. Curtis Publishing Co. v. Butts,* 351 F.2d 702, 717 (5th Cir. 1965), *aff'd* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967)], since the evidence merely affected the weight to be accorded Knox's testimony and would not have changed the result in this case. The trial judge found that the admission of the deposition in evidence would not change any finding of fact. The trial judge has made this credibility determination and we have been shown no convincing reason to disturb it.

A formidable array of evidence thus supports the district court's finding that Crown participated in an elaborate conspiracy among independent oil dealers to fix the retail price of gasoline in the Baltimore area in the early 1970's. It is settled law that

> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.* * * * *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940).

Therefore, the district court's finding of liability on the charge of horizontal price fixing must be affirmed unless Crown can demonstrate that the finding is clearly erroneous or that Crown has a legal defense. It has done neither.

Crown argues that each of the pieces of evidence supporting the horizontal conspiracy finding is so small and unconvincing that the evidence as a whole does not amount to proof that a conspiracy existed. We are not constrained, however, to be so microscopic in our examination of the record. As the Supreme Court wrote in *Continental Ore Co. v. Union Carbide,* 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962):

> * * * In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ". . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. [citation omitted.] and in a case like the one before us, the duty of the jury [and, therefore, of the trial judge in the case at bar] was to look at the whole picture and not merely at the individual figures in it." *American Tobacco Co. v. United States,* 147 F.2d 93, 106 (6th Cir. 1944).

Taken as a whole, the evidence presented at trial and reviewed above affords adequate support for the conclusion that Crown participated in a horizontal price-fixing conspiracy. Crown has pointed to a few minor points in the findings of fact (such as that Crown employees were proud of the price stability in the Maryland market) which may be slightly inaccurate. But minor flaws in the record are to be expected in a case of this size and complexity, and we hold that these errors (if errors they were) are harmless. The major findings of fact are fully supported by the record.

Crown next maintains that the district court failed to consider the objective evidence Crown introduced to explain and justify its pricing policies and changes. Evidence of the pricing patterns of the major oil companies, plus evidence from legitimate sources of the availability of information regarding gasoline prices charged by independent companies, says Crown, disprove the existence of a conspiracy, because the pricing policies could have arisen legitimately. This argument sidesteps the district court's finding that *these* pricing policies did *not* arise legitimately; the trial judge was as free to disregard this evidence as he would have been to disregard the contrary evidence (supporting the conspiracy finding) which Crown now asks us to ignore. The district court did not err in failing to accord conclusive weight to Crown's evidence of independent pricing justification.

Finally, Crown argues briefly that the telephone calls admittedly made by its officers about gasoline prices were legitimate inquiries to avoid potential Robinson-Patman Act violations. Passing over the obvious rejoinder that price discrimination claims under the Robinson-Patman Act arise only when prices decrease (and these calls were often associated with price increases), it is enough to point out that only one witness at trial (Wilbur Pressler) mentioned the Act as a possible justification for the pricing calls, and he failed to keep records of the calls which would be the natural object of anyone genuinely concerned over Robinson-Patman violations. The district court was justified in rejecting this tenuous contention.

III. The Vertical Price-fixing Findings

In addition to the horizontal agreement among the independent oil companies to stabilize retail prices, the district court also found the existence of a vertical conspiracy by means of which Crown controlled its dealers' retail prices. Crown asserts that this finding is based on a misinterpretation of the evidence presented at trial, and that no vertical conspiracy existed.

We note first that the district court found a "pervasive web of illegality," and that the division of a price-fixing scheme such as that found here into "horizontal" and "vertical" components is, in some measure, an abstraction.[2] The horizontal agreement would have been worthless if Crown had not the power to control the retail prices charged by its dealers. The point of the horizontal conspiracy was to stabilize the *retail* price market, and an agreement with competitors to hold retail prices steady would not work without control over those prices. The existence and duration of the horizontal conspiracy, then, is itself some measure of proof that Crown was able to control the retail

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[2] The difficulties generated by this abstraction are illustrated by the parties' semantic wrangling—and the trial judge's partial confusion—over which damages are attributable to which part of the conspiracy, a problem discussed more fully below.

prices its dealers charged. Crown recognizes this when it argues that the vertical price-fixing must fall if the horizontal case is not proved. Since we have upheld the finding of horizontal price fixing, the reverse is true: the vertical price-fixing conspiracy finding is buttressed by the finding of the horizontal conspiracy.

Turning to the substantive evidence, we find in the record ample support for the district court's finding of vertical price fixing. The most convincing piece of hard evidence is a memorandum dated October 9, 1968, which Crown Vice President John I. Loving wrote to Crown Regional Manager T. H. Cahir (with copies to Garrison and Pressler). The memorandum outlined the agreement to be reached with a new independent dealer. The first paragraph of the outline read:

> Gross gasoline margins of 4.75¢ and 5.25¢ house brand and premium, respectively. Margins on both grades to escalate up or down ¼¢ per gallon with each 1¢ on the pump (base posting = 29.9¢ and 33.9¢). This does not apply to postings increased due to a tax increase. Minimum margin will be 3.75¢ and 4.25¢. Above understanding to be verbal. Pump postings at Crown's discretion.

This single piece of evidence demonstrates that Crown was to control both the retail price being set and the dealer's profit margin, which was to be keyed directly to the preset retail price. Its insistence on a verbal agreement also suggests some consciousness of wrongdoing on the part of Crown's officers.

Crown attempts to circumvent the devastating implications of this memorandum by maintaining that the document was an internal communication which decribed Crown's method of calculating its wholesale price from a previously determined "suggested" retail price. This argument must fail, since the document by its own terms is a description of the agreement to be reached with the dealer, not a guide to wholesale price calculation. Furthermore, the phrase "pump postings at Crown's discretion" is hardly consonant with the notion of a "suggested" price; it sounds more like a fiat than a suggestion.

A second highly probative piece of evidence is a clause in Crown's standard dealer lease which provided that any dealer's lease could be cancelled on 5-days' notice for any reason, or for no reason at all. Short-term leases have been found to be inherently coercive devices, and when used to promote price-fixing schemes they become patently illegal. The Supreme Court wrote in *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 368, 85 S.Ct. 1498, 1505, 14 L.Ed.2d 443 (1965), that

> * * * Among the sources of leverage in [the oil company's] hands are its lease and equipment loan contracts with their cancellation and short-term provisions. Only last Term we described the power implications of such arrangements in *Simpson v. Union Oil Co.*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964), and we need not repeat that discussion here. * * *

The inherently coercive leases found unacceptable in *Simpson* were simply 1-year renewable leases with no 5-day cancellation clause like that found here.

Of course, the mere existence of the clause does not prove an antitrust violation. It must be shown that the clause was used to further an illegal scheme. An abundant showing was made in this case. Plaintiffs Phillips and Freitag were threatened with abrupt cancellations if they failed to comply with Crown's "suggested" retail prices. So were Margaret Kling, David Horner, and William O'Hara, three Crown dealers who are not parties to this suit.

Furthermore, all four plaintiffs, and other nonparty witnesses, testified to considerable pressure by Crown to insure compliance with Crown's retail pricing policies. On one occasion, a Crown representative actually changed the prices on Tumminello's pumps during his absence from his station. Other testimony could be cited, but what we have discussed establishes that the trial judge permissibly found the existence of an extensive (and largely successful) vertical price-fixing conspiracy. Consequently, the district court's finding of liability on the vertical price-fixing conspiracy count is affirmed.

IV. The Motor Oil Tying Agreement

Crown prohibited its dealers from selling any brands of motor oil other than Crown's own. The district court held that this prohibition was an illegal tying agreement in violation of section 1 of the Sherman Act (15 U.S.C. § 1). Because we feel that the district court misinterpreted the emerging law of tie-ins in franchise settings, we reverse on this issue.

A *per se* tying violation is shown when three elements exist: The fact of a tying agreement, the affecting of a "not insubstantial" amount of interstate commerce, and sufficient economic power in the market for the tying product for the seller to restrain competition in the market for the tied product. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). The first of these elements is uncontested; the district court's finding that the second existed is supported by substantial evidence and should not be disturbed. The difficulty centers on the third element—the seller's economic power in the market for the tying product.

The district court nowhere identified what it considered to be the tying product in this case. It is possible that either Crown gasoline or Crown service station leases were deemed to be the tying product. Without inquiring at length into the market for either, the court simply observed that Crown's power to impose the tie-in was amply demonstrated by the fact that it had done so. The court was probably guided by remarks in past tying cases that the oil company's plenary economic power over its dealers is inherent in the structure and economics of the petroleum distribution system. *Federal Trade Commission v. Texaco, Inc.*, 393 U.S. 223, 226, 89 S.Ct. 429, 21 L.Ed.2d 394 (1968).

But that comment, and others like it, were made in cases where the tied product was not purchased directly from the seller of the tying product. Slightly different considerations apply when the tying agreement is part of an otherwise valid franchise arrangement, since the very essence of a franchise is the purchase of several related products in a single of several related products in a single competitively attractive package. A thorough discussion of the law of tying agreements in franchise settings is found in *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1224 (3d Cir. 1976). The Third Circuit, faced with the problem of deciding whether class action plaintiffs had to show that they were each individually coerced by the exercise of dominant market power, analyzed the problem in this way:

> * * * Under the district court's theory a class of franchisees could prove a per se illegal tying arrangement by establishing: (1) that the franchisor was economically dominant over its franchisees; (2) that the franchisor offered for sale, and sold, more than one product to its franchisees; and (3) that the franchisor had a policy to persuade franchisees to buy its products.
>
> It is difficult to conceive of a franchisor-franchisee relationship in which this could not be established. The very nature of the franchise institution contemplates the presence of a comparatively strong financial entity—the franchisor—that makes available to a relatively weaker financial entity—the franchisee—an attractive business opportunity at a relatively modest initial investment. * * *

This analysis makes clear that it is the seller's power in the *lease* market that must be examined (since no dealer could obtain or keep a Crown lease without agreeing to the tie-in) to see if the necessary economic power existed. Such an inquiry was outlined in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), where the court observed:

> * * * Plaintiffs could show, for example that the defendants controlled a majority of existing service stations and that because zoning restrictions and high capital costs make development of new stations difficult, the defendants have sufficient market dominance over existing stations to impose a tie-in. [561 F.2d at 454.]

No showing of this kind was made in this case. The only relevant evidence in the record is that Crown's service stations captured about 4 percent of the gasoline market in the Baltimore area. And this figure is of doubtful relevance to power in the lease market. Lacking any other evidence on this point, it is clear that plaintiff's tying claim must fall for failure of proof. Accordingly, the motor oil tying agreement did not violate section 1 of the Sherman Act; the plaintiffs are not entitled to damages, and the district court's holding on this issue is reversed.

As an alternate ground for our decision, we note that even if gasoline, not the lease, is viewed as the tying product, plaintiff's claim would still fail. In *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), we held that an oil company whose share of the market was more than 10 percent had sufficient economic power to support a finding of an illegal tying agreement where the tied product was not purchased from the lessor as part of the franchise agreement, rather from a third party which paid a commission to the lessor. The *Osborn* case probably represents a showing very close to the minimum permissible, and the case before us simply does not fall within the *Osborn* rule either quantitatively (4 percent as opposed to 10 percent) or qualitatively (tied product produced by a seller-landowner as opposed to third party producer). Cf. the Supreme Court's remarks about market share in *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 614, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977). Thus, while we hold that the tying product in this case is the service station lease, the result we reach would not differ if the tying product were gasoline.

V. The Refusals to Renew

Crown also attacks the district court's finding that Crown's refusal to renew the leases of the plaintiff's in due course constituted an unlawful refusal to deal, because the refusals were in furtherance of a price-fixing scheme which violated the antitrust laws. Crown argues that the testimony of its witnesses showed that there was a valid business purpose for each of the terminations, unrelated to any antitrust violations. Plaintiffs respond that the supposed "business reasons" were just fabrications, and that until they began to protest Crown's illegal pricing policies, there had been no reason to refuse the renewal of their leases.

The determination of motive, especially in a cloudy area, is a matter peculiarly within the province of the trier of fact. We conclude that the trial judge did not err in deciding as he did, for there was substantial evidence to support his conclusion. Plaintiffs' past good records in the operation of their stations, the extensive evidence that operators with more serious problems than the plaintiffs were *never* terminated, and the evasiveness on the stand of Edward T. Gillespie, Crown's main witness on this matter, are sufficient to uphold the finding of the district court.

> * * * A refusal to deal based upon a contract provision [permitting termination or nonrenewal] is, in respect to the antitrust laws, no different from the right of traders generally to select their customers. In either case, the right is limited to situations where the seller has not put together an arrangement in restraint of trade. * * * *Osborn v. Sinclair Refining Company*, 324 F.2d 566, 575n (4th Cir. 1963).

VI. The Permanent Injunction

On December 15, 1975, the district court issued a mandatory injunction which granted to each of the four plaintiffs a 3-year lease on the premises occupied by him, beginning with the date of the court's order. The defendant was also enjoined from refusing to renew the leases at the end of the 3-year term for any retaliatory reason related to the plaintiffs' success in the litigation or for any other reason prohibited by the antitrust laws. In this appeal, defendant argues that the injunction should be dissolved by this court on the ground that the plaintiffs have not demonstrated, and the district court has not found, that legal remedies were inadequate to compensate the plaintiffs for damages resulting from antitrust violations.

This court vacated the permanent injunction without prejudice when the case was first appealed, since we were unsure of the extent of Tumminello's perjury and we were hesitant to continue in effect an injunction which might be based largely on perjured testimony. We did not suggest at the time that there was an inadequate basis for the injunction as it then existed; indeed, we noted that the district court had "a substantial basis, apart from Tumminello's testimony, to support his injunction * * *." *Phillips v. Crown Central Petroleum Corp., supra*, 556 F.2d at 705. We reaffirm that statement now. The district court has expressly found (opinion of October 24, 1975):

> * * * Crown's proclivity for persistently disregarding the antitrust laws * * * belies any finding that a termination of the leases today, or in the near future, would be based on lawful reasons. [citations omitted.] This Court finds clear evidence indicating a danger of recurrent violations. * * *

The district court permissibly concluded that a permanent injunction was necessary to shield the plaintiffs from the effects of future antitrust violations by Crown. A future injury of uncertain date and incalculable magnitude is irreparable harm, and protection from such an injury is a legitimate end of injunctive relief. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S.Ct. 1562, 23 L.Ed. 129 (1969); *United States v. Gypsum Co.*, 340 U.S. 76, 89, 71 S.Ct. 160, 95 L.Ed. 89 (1950); *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), *cert. denied* 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101 (1970).

After this court's decision of April 6, 1977, defendant's counsel wrote to the trial judge as follows:

> As we construe the Fourth Circuit opinion, the Court of Appeals contemplated a hearing of the type requested in Crown's motion, *i. e.*, a hearing *limited to* the falsity of Tumminello's testimony beyond the admitted perjury, submission of new proposed findings and briefs and reevaluation of the evidence in the record * *. [Emphasis supplied.]

However, on the same day defendant filed with the district court a motion for hearing on the issuance of a preliminary injunction, contending that since the permanent injunction had been vacated, it was plaintiffs' burden to show the propriety of any new relief, and stating that in view of the developments that had occurred since the issuance of the injunction, plaintiffs could not meet that burden. Crown agreed that the district court had the power to enter a short-term restraining order pending discovery in preparation for an evidentiary hearing.

On April 26, 1977, after hearing oral argument of counsel, the trial judge issued an oral opinion denying the defendant's request for an evidentiary hearing and stating that a preliminary injunction would be entered without prejudice to defendant's right to dissolve the same as to one or more of the plaintiffs. It was the district court's interpretation of our decision that the status quo should be maintained until a decision was made on the principal question covered by this court's remand. An order was entered on the same day, vacating the permanent injunction as to plaintiffs Phillips, Freitag and Myers. By that time, Tumminello had been removed from his filling station because of his perjury and on the basis of the district court's decision that equitable relief should not be invoked prospectively for his benefit.

On May 12, 1977, defendant filed a motion to vacate the preliminary injunction as to plaintiffs Myers, Phillips and Freitag. Myers relinquished his station voluntarily on May 11, 1977, and the preliminary injunction was dissolved as to him by order dated June 27, 1977.

As previously stated, the district court on August 19, 1977, issued its decision and opinion in which it resolved the issues regarding the effect of Tumminello's perjury and ordered that plaintiffs Phillips and Freitag were entitled to a permanent injunction as provided in the order of December 15, 1975.

On August 29, 1977, Crown filed a motion to amend the order of August 19, 1977, and the district court responded by memorandum and order of October 13, 1977, setting forth its interpretation of our decision of April 6, 1977. The order stated that the district court had found that the perjury of Tumminello was in fact limited and that a solid factual structure remained for the issuance of the permanent injunction. The order further provided that if events occurring since December 15, 1975, required a modification of the relief granted, Crown should file a motion to modify or dissolve the permanent injunction on the basis of facts which were not then of record. The court's order stated that it had invited Crown to do just that.

On November 15, 1977, Crown filed a motion to vacate or modify the permanent injunction which was ordered August 19, 1977, and at the time the parties filed their briefs herein, discovery was proceeding as a result of the filing of that motion.

Crown did not timely appeal from the order of April 26, 1977, which reentered the preliminary injunction, but now argues that the trial judge committed reversible error in renewing the injunction without a hearing to determine whether equitable relief was still warranted. Crown contends that it should have been afforded an opportunity to demonstrate that the conditions had changed so much that a permanent injunction was no longer required, and that the trial judge's order shifted the burden of proof from plaintiffs to defendant. When the term "vacated without prejudice" as used in our order is viewed in isolation, it cannot be said that Crown's contention is frivolous or wholly without merit. However, one must carefully consider all of the court's decision of April 6, 1977, to determine what this court intended when the injunction was vacated. The vacation "without prejudice" was a procedural device in the nature of a stay which was intended to permit the district court to determine the extent of Tumminello's perjury before the injunction became final. This is clear from the following portion of this court's previous opinion:

> * * * It is possible that the perjury was limited, and *there remains* a solid structure for the injunction. * * Hence, we conclude that the District Court should have granted defendant's motion *to vacate or stay* the injunction and to conduct a hearing as prayed. *Phillips v. Crown Central Petroleum Corp., supra,* 556 F.2d at 705. [Emphasis supplied.]

We did not intend, after it had resolved the primary issue on remand, to require the district court to disregard all of the evidence upon which it had relied in issuing the injunction, nor to obligate plaintiffs to file a new application for equitable relief as though no evidence in support thereof had ever been introduced in this protracted litigation. Admittedly, it would have been more appropriate and more consistent with this court's intention if the order of remand had "stayed" rather than "vacated" the injunction. However, on review of the whole record, we conclude that the district court properly interpreted and applied our decision and order of April 6, 1977, and that the district court did not err in the reentry of the preliminary injunction in order to maintain the status quo pending resolution of the controversy arising out of Tumminello's perjury. We hold also that after this issue was disposed of, the district court correctly decided that the record provided a solid basis for making the injunction permanent as to plaintiffs Phillips and Freitag.

If as defendant asserts, conditions prevailing since December 15, 1975, require a modification or dissolution of the injunction, that issue can be determined by the trial court on the basis of Crown's pending motion to vacate or modify the injunction ordered August 19, 1977.

VIII. Damages

Excluding the tie-in damages, damages were assessed in favor of the four plaintiffs aggregating $431,310 after being tripled. On the basis of testimony of plaintiffs' witness, Dr. Carl F. Christ, and exhibits prepared by him, the district court found substantial "horizontal damages" and "vertical damages." The terms appear to be related to the horizontal and vertical conspiracies alleged, but the theories underlying the assessment of damages are only loosely related to the facets of the conspiratorial scheme. The "horizontal damages" assessment was based upon a finding that Crown's wholesale prices to the plaintiffs during the conspiracy period were higher than a competitive price, while the vertical damages award was premised upon the theory that Crown prevented its dealers from charging higher retail prices. We think the award of "horizontal damages" sustainable, but the award of "vertical damages" inconsistent and unsupportable.

A.

Dr. Christ reasoned, and the district court found, that the conspiratorial limitation of competition among distributors enabled Crown to impose retail price requirements upon its dealers. It is true that during the period of the conspiracy there were no price wars between the retail outlets of the conspirators, except that one of Crown's retail outlets, Station P57 was in immediate competition with a Phillips station located at the same intersection. Phillips was not a member of the conspiracy, and, during the five-year period during which the conspiracy operated, the retail price of Crown gasoline at Station P57 was usually lower and never higher than Crown's imposed retail price upon the plaintiffs.[3] Crown gave the plaintiffs some incentive to maintain the imposed retail prices, for the wholesale prices charged to the plaintiffs moved in a predetermined relationship with their retail prices. Each increase in the retail price at the pump was divided between the dealer and Crown on a one to three basis. Thus, if there were an increase in the retail price of one cent a gallon, the dealer's gross profit margin was increased by one-fourth of one cent while Crown's wholesale price was increased by three-fourths of one cent. Since the higher the price the wider the dealer's margin, each dealer had a substantial incentive to comply with Crown's directions about retail prices, and there was no counter incentive since there was

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[3] Occasionally, Station P57 did not have the lowest Crown price in town. For convenience, however, we will consistently refer to the lowest charging station as P57.

general agreement that maintenance of these prices did not cause a loss of retail sales.

Dr. Christ reasoned that the retail prices at Station P57 reflected the competitive price of gasoline in the Baltimore area. Since those prices at Station P57 were never above and usually were lower than the retail price imposed upon the plaintiffs, Dr. Christ computed the daily differentials. Applying the three to one ratio by which retail price increases and decreases were shared, he computed what the wholesale price to the plaintiffs would have been if their retail prices had been the same as those charged at Station P57. Applied to the actual gallonage sold by each dealer, he arrived at a sum by which the district court found that Crown's wholesale prices to these dealers had resulted in overcharges which could not have been exacted without the horizontal and vertical conspiracies.

Dr. Christ's "horizontal" damages represent compensation to the plaintiffs from the bottom end of their margin diminution. Here there is no error in calculation, since the wholesale price calculated by Dr. Christ for Station P57 (or any other station that happened to be charging the lowest price on a particular day) is presumably the price that Crown actually charged to that station. This price is a good yardstick for determining that wholesale price Crown should have been charging to all of its dealers, and the damages plaintiffs sustained for being charged an artificially high wholesale price were correctly calculated as simply the difference between the actual wholesale price charged to each plaintiff and the lower price charged to another station, multiplied by the total number of gallons purchased.

Crown's other arguments attacking the horizontal award all go to the specificity of the supporting evidence and the appropriateness of the standards used by the trial judge. Crown claims, for instance, that Station P57 was in an exceptional, competitive situation, that Crown accorded that station special treatment, and that it is wrong to suppose that Crown could have charged P57's "unrealistically low" wholesale price to all its dealers. We reject this contention, and others like it, because

> * * * a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. * * * *Eastman Co. v. Southern Photo Co.,* 273 U.S. 359, 379, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1927).

If Station P57's wholesale price was unrealistic or aberrant, Crown has only itself to blame for not being able to point to another station whose price was more normal. The district court was entitled to use what it correctly perceived to be the best approximation of what the wholesale prices should have been.

One issue concerning the horizontal damages merits further attention. In *Hanover Shoe, Inc. v. United Shoe Mach. Corp.,* 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), the Supreme Court held that a defendant-monopolist who increased the plaintiff's costs could not defend by asserting the plaintiff had passed on the extra costs to its buyers. The Court thus rejected, as a general rule, assertion of a "passing on" defense. This seems to us a classic pass-on case. Crown charged its retailers too much for gas; its retailers, in turn, charged consumers too much for the gas it bought at artificially high prices. There are two differences between this case and more common pass-on situations. First, through the vertical price fix, the pass-on was "insisted upon" by the wholesaler; it was not voluntarily and unilaterally effected by the retailer. Second, during the conspiracy period, the retail price and wholesale price moved in a fixed relation.

Crown relies on *Obron v. Union Camp Corp.,* 477 F.2d 542 (6th Cir. 1973), *affirming* 355 F.Supp. 902 (E.D.Mich. 1972), which permitted assertion of the pass-on defense where the scheme of distribution was "comparable to a 'cost-plus' contract." *Id.* at 543. There the dealer bought at 5% less than the wholesaler's list price and invariably resold at the list price. "Thus, whatever price [the wholesaler] imposed on the plaintiff, the plaintiff passed on to his customer plus 5%." *Id.* This case is different. It is true that the dealers' retail prices moved in a fixed proportion to the wholesale price. But, unlike *Obron,* no cost-plus arrangement insured that this immutable ratio would apply even in the absence of a conspiracy. Indeed, a free market surely would and did disrupt it. *See* Pl. Ex. 69, Table D (indicating that wholesale and retail prices did not move in a fixed relation in the post-conspiracy period). Thus we cannot say with certainty that the wholesale overcharges did not injure the Crown dealers. We know that absent a conspiracy Crown's wholesale prices would have been lower. We do not know what the dealers would have charged at retail. If, in fact, a conspiracy-imposed increase in retail prices did not significantly reduce sales, it would not have been surprising if the dealers had "found" those advantageous prices in a free market. Thus Crown's pass-on argument runs afoul of the specific teaching of *Hanover Shoe*: "Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not declined, there would remain the nearly insuperable difficult of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. . . . [E]stablishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures." *Hanover Shoe, Inc.*

v. United Shoe Mach. Corp., 392 U.S. 481, 493, 88 S.Ct. 2224, 2231, 20 L.Ed.2d 1231 (1968).[4]

B.

Dr. Christ undertook to compute what he called "vertical damages" by examining the dealers' gross profit margins on a daily basis during the post-conspiracy period beginning April 3, 1973 and ending August 24, 1973. He compared these with the "theoretical" gross profit margins which, he says, would have prevailed if the conspiracy had remained in operation during that period of almost five months. He assumed that, if the conspiracy had continued until August 24, 1973, the wholesale prices charges would have been

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[4] There is another reason for not applying the cost-plus contract exception. In *Hanover Shoe*, the court recognized that the pass-on defense might sometimes apply "—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract." 392 U.S. at 494, 88 S.Ct. at 2232. After *Hanover Shoe*, some courts opted for a broad reading of this directive, applying the cost-plus contract exception to similar arrangements. *See Obron, supra; State of Vest Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (1971). In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2601, 52 L.Ed. 2d 707 (1977), however, the Court seemingly read *Hanover Shoe* as extending the exception only to rare situations in which the middleman had a pre-existing cost-plus contract with his buyer, defining the amount to be purchased. "In such a situation, the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand." *Id.* at 736, 97 S.Ct. at 2070. In light of this restrictive rationale the cost-plus exception ought not to be applied here. *See Mid-West Paper Prods. Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir., 1979).

Here, obviously the Crown dealers had no pre-existing supply contracts with motorists. Indeed, there was no "contract" at all. The "cost-plus" arrangement arose solely out of Crown's price-fixing policies. No dealer was "insulated from any decrease in its sales" when Crown raised retail prices.

those actually charged during the period beginning April 3, 1973. He then computed a theoretical retail price on the basis of the relationship between wholesale and retail prices during the conspiracy period.[5] He found that the dealer's actual gross profit margins during the post-conspiracy period were slightly higher than what they would have been if his assumptions about prices were valid. This difference he converted to a post-conspiracy per-gallon gain which he then applied as a multiplier to all of the gallonage sold during the five-year conspiracy period.

The computation is seriously flawed. There is no basis for an assumption that wholesale prices during the post-conspiracy period were exactly what they would have been if the conspiracy had continued in effect. The district court found that the operation of the conspiracy resulted in higher wholesale prices than would have prevailed without the conspiracy. The court based a very substantial damage award upon the basis of the finding that the wholesale charges were excessive. There is no reason to suppose that, after removal of the leverage provided by the horizontal conspiracy, Crown maintained the economic power to maintain its wholesale prices at levels above competitive prices. Actual price figures establish that in the post-conspiracy period wholesale prices did not move with retail prices. The explanation which most readily suggests itself is that Crown no longer possessed the power to exact excessive charges to the extent that it had during the period of the conspiracy.

Moreover, while the testimony showed that during the conspiracy period wholesale and retail prices moved in a predetermined relationship, the control was the retail price, not the wholesale price. On the three-to-one basis, if retail prices moved up or down, the wholesale prices were adjusted. There is nothing in the record to suggest that independent movement of wholesale prices would have been similarly reflected in a movement of retail prices. Thus, Christ's attempt to hypothesize retail prices based on wholesale price movements is without foundation.

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[5] Christ did not explain what he did in this way. He simply identified "theoretical margins" at the various actual wholesale prices. Of course, one can compute the hypothetical retail price by simply adding the actual wholesale price to the theoretical margin. In effect, this is all Christ did.

The most serious flaw in the use of the computation, however, was the demonstrable falsity in its assumption that the conspiracy had exerted a general depressing effect upon retail prices during the five-year period of the conspiracy. Clearly, this was Christ's assumption, for in five months' worth of post-conspiracy margin comparisons, there is not a single instance in which an hypothesized retail price exceeded the actual retail price.

The whole thrust of the plaintiffs' proof and the district court's findings was that Crown's price fixing kept retail prices up. Dr. Christ testified that the price fixing raised the retail price level, and the district court found that he had convincingly shown that without Crown's illegal restraints the retail price for gasoline would have been lower. Indeed, this was the basic premise upon which horizontal damages were awarded, since it was assumed that, without the conspiracy, retail prices charged by these plaintiffs would have been comparable to those charged by Station P57. The lowest price was posited to be a competitive retail price. Horizontal damages were awarded as a direct function of the extent to which the plaintiffs' prices exceeded the lower price. Notably, the plaintiffs' prices were never lower.

Crown is one of the minor distributors of gasoline. Its retail outlets, as those of other minor distributors, attract customers from the retail outlets of the major distributors by offering gasoline at somewhat lower prices. Before the conspiracy period, however, competition between the minors had resulted in price wars during which the differential between prices charged by the majors and the minors would widen to the point that the major distributors would put into effect retaliatory price cuts, thus lowering the ceiling to which the prices charged by dealers for the products of the minors could rise. The whole purpose of the conspiracy was to put an end to that kind of competitive effect. As long as the conspiracy was in operation, the endeavor of the conspirators was to maintain retail prices for their products at a level sufficiently below the retail price of the products of the major distributors to attract customers, but not so low as to affect the retail pricing of the products of the major distributors. Thus, the whole purpose of the conspiracy was to maintain retail prices above competitve levels.

The district court did find that on two occasions Crown vetoed retail price increases proposed by its dealers. If they suffered losses on that account, it is possible that they might be recoverable, but clearly the effects of these occurrences were transitory. Clearly, Christ has not attempted to measure any transitory effect of the restraints that Crown placed upon retail price increases, for he applied the multiplier to all of the gallons of gasoline sold throughout the entire period of the conspiracy, including gallons sold at inflated prices. Oddly, he did not seem to recognize that he was contradicting himself and the basis upon which horizontal damages were sought.

Clearly, comparisons of the dealers' actual gross profit margins during the post-conspiracy period with an entirely theoretical profit margin based upon competitive wholesale prices cannot be used to compensate any possible loss of sales during the conspiracy period. Dr. Christ himself testified that the actual gallonage sold was a reasonable approximation of what would have been sold in the absence of a conspiracy. If any such loss of sales because of the maintenance of higher retail prices had been suspected, it surely could not be measured by any data extrapolated from the post-conspiracy experience. Nor can damages be awarded on the basis of any such data with its essential inference that during the conspiracy period there had been a general depression, rather than a general inflation, of retail prices.

The wholly inconsistent awards of horizontal and vertical damages under these circumstances cannot stand.

IX. Attorneys' Fees

There was an award of $200,000 as attorneys' fees for the plaintiffs. The amount of the damage award in the district court was a highly relevant consideration in fixing the amount of the attorneys' fees. Since we have determined that plaintiffs are not entitled to recover any part of the damages awarded to them by the district court as "Vertical Damages" and "Motor Oil Damages," this reduction in the damage award requires that there be an appropriate reduction in the amount allowed for attorneys' fees. Appropriate for consideration, too, is the fact that plaintiffs, their lawyers, and their expert, Dr. Christ, complicated the computation of damages by confusing injections of inconsistent premises and assumptions. The district court is, therefore, directed to make redetermination of the amount that should be awarded as attorneys' fees on the basis of these additional considerations.

X. Conclusion

The judgment is affirmed in part and reversed in part and the case remanded for further proceedings consistent with this opinion.

Widener, Circuit Judge, concurring and dissenting:

While I concur with the substantive holdings of the panel in this complicated case, I respectfully dissent on the issue of whether the district court properly conducted the remand hearing. I simply do not feel that the trial court complied with our remand order requiring "a full hearing" to determine the true extent of Tumminello's perjury, and an "examination thereafter of the findings, conclusions, and injunction." 556 F.2d 702, 705 (4th Cir. 1977).

On remand, the district court heard Tumminello testify as to the extent of his perjury, and held that the remainder of his testimony should be credited. In so doing, the district court credited Tumminello's testimony over the testimony of several Crown officials, including James C. Blackman, who had testified only by deposition at the trial. The defendant requested, among other things, that Blackman be allowed to testify in person at the remand hearing, but the district court denied this request. I believe the denial of this request was error. The court credited an admitted perjurer who admitted to the manufacture of false evidence in this very case over a Crown witness without ever viewing the demeanor of the latter. Of course, issues of credibility are often peculiarly within the province of the trier of fact and normally are within the scope of only limited appellate review. However, this rule has as its principal rational foundation the opportunity of the trier of fact to view the live testimony of both witnesses and then credit one over the other. It is the opportunity to hear the witness testify and observe his manner and demeanor on he stand which places the district court in a better position to judge credibility than that of an appellate court which must rely on a cold paper record.

In the case at bar, the district court credited live testimony over evidence taken by deposition, but the live testimony was from a witness whose admitted perjury with respect to certain parts of his testimony was the reason the case was remanded in the first place. I believe the district court was obliged to hear the live testimony of Blackman before making a credibility determination. It may be that after so doing the district court would yet have credited Tumminello, or it may be that even if Tumminello's testimony had not been credited the other evidence in the case might support a plaintiff's judgment. But the district court did not in terms base its holding on the sufficiency of evidence other than Tumminello's to support its finding, and, since it refused to hear Blackman, I would remand the case once again, this time for a new trial, and would give the defendant the opportunity to request trial by jury were it so advised.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1780
No. 78-1078

JOHN T. PHILLIPS, JR., CORRADO FRANK TUMMINELLO, CHARLES PHILLIP FREITAG AND CARROLL CHARLES MYERS,
Plaintiffs-Appellees,

versus

CROWN CENTRAL PETROLEUM CORPORATION,
Defendant-Appellant.

Order

Filed August 27, 1979

Upon consideration of the petition for rehearing and the suggestion of rehearing *en banc,* and there having been no request for a poll of the court on the suggestion of rehearing *en banc,*

IT IS NOW ORDERED that the petition for rehearing be, and it hereby is, denied,

With the concurrence of Judge Cowen.

Judge Widener would grant rehearing.

/s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

August 24, 1979

APPENDIX C

United States District Court,
D. Maryland

Civ. Nos. 73-303-H, 73-304-H, 73-504-H and 73-506-H.

John T. Phillips, Jr., *Plaintiff,*

v.

Crown Central Petroleum Corporation, *Defendant.*

Corrado Frank Tumminello, *Plaintiff,*

v.

Crown Central Petroleum Corporation, *Defendant.*

Charles Phillip Freitag, *Plaintiff,*

v.

Crown Central Petroleum Corporation, *Defendant.*

Carroll Charles Myers, *Plaintiff,*

v.

Crown Central Petroleum Corporation, *Defendant.*

May 20, 1975.

Alexander Harvey, II, *District Judge*:

These consolidated cases involve various antitrust claims asserted by four independent gasoline service station dealers against their supplier-landlord. Each of the four plaintiffs operates in the Baltimore metropolitan area a filling station leased from his supplier, defendant Crown Central Petroleum Corporation (hereinafter "Crown"). Each has filed a separate action in this Court seeking treble damages, attorney's fees, costs and injunctive relief under

Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 1, 15 and 26.[1]

In language that is almost identical, the four complaints allege an illegal horizontal conspiracy between Crown and its competitors, an illegal vertical agreement between Crown and each plaintiff and an illegal tying agreement between Crown and each plaintiff. Specifically, it is alleged (1) that in recent years Crown has unlawfully combined and conspired with certain competitors to raise, fix, stabilize and maintain wholesale and retail gasoline prices in the Baltimore metropolitan area; (2) that since plaintiffs have been lessees of their stations, Crown has unlawfully fixed and determined the retail prices for the sale by plaintiffs of gas and oil; (3) that Crown has unlawfully required plaintiffs to purchase motor oils from it; and (4) that Crown has unlawfully restricted plaintiffs as to types of other products sold at their stations through vending machines or otherwise and as to the sources from which such other products could be purchased.

After each suit was filed, Crown notified each plaintiff that his lease would not be renewed.[2] Plaintiffs thereupon filed a combined motion for a preliminary injunction under § 16 of the Clayton Act, 15 U.S.C. § 26, seeking to enjoin Crown from terminating or not renewing their leases, pending the final determination of these actions. Following extensive discovery, a hearing was held on such motion, and this Court ruled that a preliminary injunction should be entered to prevent irreparable harm to plaintiffs and to maintain the status quo during the pendency of this litigation. Phillips v. Crown Central Petroleum Corporation, 376 F.Supp. 1250 (D.Md.1973). Under the terms of this Court's preliminary injunction of September 20, 1973, plaintiffs have continued to operate their service stations subject to the provisions of Crown's current Lease and Dealer Agreement, under which all of Crown's dealers in Maryland now operate their stations.

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[1] Represented by the same attorneys, two of the plaintiffs filed suit in April 1973, and the other two filed suit in May 1973. All four cases were consolidated for all purposes, including trial, pursuant to Rule 42(a), F.R.Civ.P.

[2] As noted hereinafter, a new lease was tendered to plaintiff Myers and actually signed by him, subject to certain conditions. Crown refused to accept such conditions, and Myers' lease, like the others, was not renewed.

Many of the background facts involved in this litigation are set forth in this Court's previous Opinion, which is reported at 376 F.Supp. 1250-1258. However, the only issue involved there was plaintiffs' right to a preliminary injunction and the only claims considered were that plaintiffs were not being renewed because they had refused to comply with illegal directives from Crown to fix their retail prices of gas and oil and because they had insisted on their right to sell products other than those designated by Crown.

Because of the urgent necessity that plaintiffs' right to continue as dealers during the pendency of the litigation be determined at the earliest possible date, the motion was decided without an evidentiary hearing and on the affidavits, exhibits and deposition filed by the parties. In its Opinion, this Court noted that there were numerous conflicts between affidavits submitted by the plaintiffs and those filed on behalf of Crown. 376 F.Supp. at 1254. Findings were made on the basis of the record then before the Court, and the right was reserved to the parties to relitigate fully at trial all the factual issues. As a result of such findings, this Court concluded that plaintiffs at trial would probably be able to establish that their leases were not renewed because they had objected to illegal coercive pressures brought by defendant against each of them. 376 F. Supp. at 1256.

Following extensive additional discovery and pre-trial proceedings, these consolidated cases were tried by this Court sitting without a jury.[3] With the agreement of the parties, the Court ordered a bifurcated trial, with all issues of liability being tried first and all issues of remedy reserved for a later trial if this Court were to find liability.

The trial lasted some four weeks. The numerous witnesses included, of course, the plaintiffs themselves and various officers and representatives of Crown. The testimony was sharply conflicting as to most factual issues. Proposed findings of fact were filed by the parties before the trial and supplementary proposed findings after the trial. In making the detailed findings of fact set forth hereinafter, this Court has generally credited the testimony of the plaintiffs and the witnesses called on their behalf and has therefore accepted many more of plaintiffs' proposed findings than defendant's.[4] The accounts given by the plaintiffs of their dealings with Crown are corroborated by other evidence in the case and in particular by the testimony of witnesses who had no particular stake in the outcome of this litigation.[5] Throughout the lengthy trial, various non-party witnesses called by plaintiffs generally gave a description of Crown's operating methods and relations with its dealers and competitors which was similar to that given by the plaintiffs in their testimony.

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[3] Plaintiffs had originally requested a jury but thereafter waived their right to a jury trial.

[4] Some proposed findings of both plaintiffs and defendant were rejected by the Court because they were not supported by the credible evidence. Others were not accepted because they were not pertinent to a resolution of the legal issues presented or because they were duplicative of other findings.

[5] Included among these were the witnesses Knox, O'Hara, Kling, Horner and Mech.

ISSUES

It is agreed that the following issues are presented to the Court in this case:

1. Did Crown violate the antitrust laws by engaging in horizontal price-fixing?

2. Did Crown violate the antitrust laws by engaging in vertical price-fixing?

3. Did Crown violate the antitrust laws by imposing unreasonable restraints on the plaintiffs as to their freedom to purchase and sell motor oils, antifreeze, vending machine items and other products?

4. If the antitrust laws were violated in one or more of these respects, did such violation cause Crown not to renew the leases of plaintiffs or did the plaintiffs suffer other injury as a result of such violation?

FINDINGS OF FACT

(a) *General Findings*

1. Crown Central Petroleum Corporation is a Maryland corporation with its principal office in Baltimore, Maryland. Crown operates a refinery located in Houston, Texas and markets gasoline through service stations trading under the Crown name located in fourteen Eastern and Gulf Coast states. In 1972 and 1973, Crown's gross revenues were $183 million and $213 million respectively, while net profits after taxes were $1.3 million and $8.4 million respectively. For the six months ended June 30, 1974, revenues increased 2.2 fold, year to year.

2. Crown is generally referred to in the petroleum industry as an "independent" gasoline marketer, as are other oil companies, including Ashland Oil Company, Hess Oil Company, Petroleum Marketing Corporation (PMC), Meadville Corporation and Hudson Oil Company. PMC

operates the "Scot" stations and Meadville operates the "Saveway" stations. Gasoline sold at service stations supplied by the independents is generally sold at prices lower than the prices charged at service stations supplied by the "Major" oil companies, including Exxon, American Oil, Gulf and Citgo.

3. In 1968, Crown altered its method of marketing gasoline in the Maryland market. At this time, Crown began to sell its gasoline through the so-called "multipump" marketing concept. This involved the sale of gasoline and motor oil at discount prices in modern, well-lighted, clean and uncluttered service stations featuring fast, efficient service by neatly-groomed attendants. Before 1968, Crown had itself owned and operated its service stations in the Baltimore area. In changing its method of operation, Crown felt that an independent dealer would be better able than a company employee to maintain supervisory control over the station's attendants and facility and that this would serve to enhance Crown's image of clean appearance and fast service. Through its multipump outlets, Crown has continually increased its share of the Maryland gasoline market. In 1968, Crown's total sales of gasoline in Maryland amounted to less than 2% of the market. For the year 1972, it had raised its share to 4%.

4. By 1973, in the Maryland market, Crown was the largest of the independent gasoline marketers and its 5% share of gallonage sales was the fifth largest market share of all gasoline marketers, including the "major" oil companies. By that date, it was surpassed, insofar as its share of the market was concerned, only by Exxon, American Oil, Shell and Gulf.

5. The independent dealers would lease their stations from Crown, purchase petroleum products from Crown and hire and maintain their own attendants.

6. Each Crown dealer would execute a lease, a dealer contract and an Equipment Loan Agreement. Prior to 1973, each of these instruments was for terms of one year and renewed itself for successive one-year terms, if not terminated. The contracts and leases were cancellable on five days' notice.

7. Since July 1, 1973, when the Maryland Gasoline Product Marketing Act went into effect, Crown and its dealers, other than plaintiffs, have entered into new contracts with terms ranging up to three years.

8. Crown has found that its dealers have, for the most part, maintained clean, attractive stations and provided fast, efficient service. Sales at Crown's multipump stations have continued to grow under dealer operation, with the result that Crown's sales, profits and share of the Maryland market have increased. At the same time, such operation of multipump stations has proved to be profitable for the dealers.

9. Each plaintiff is an independent Crown service station dealer and has operated his Crown service station pursuant to leases and contracts with Crown. Plaintiff Phillips operated a Crown service station located at Garrison and Wabash Avenues in Baltimore City during the period December 21, 1970 until January 1971. Since January 25, 1971, Phillips has operated the Crown service station located at Ritchie Highway and Old Annapolis Road. Plaintiff Tumminello has operated the Crown service station located at 5838 Belair Road since March 1969. During the period 1964 until March 1969, Tumminello was employed by Crown first as a Sales Representative and then as a Sales Supervisor. Plaintiff Freitag has operated the Crown service station located at Harford Road and Northern Parkway since November 25, 1970. Plaintiff Myers has operated the Crown service station located at Quarterfield and Old Stage Roads since August 18, 1970.

10. Each plaintiff originally operated under a renewable one-year lease and contract. Plaintiff Phillips was offered and accepted a six-month lease and contract in December 1972. He filed his suit in this Court on April 3, 1973. He was notified on May 11, 1973 that his lease and contract would be allowed to expire. Plaintiff Tumminello was offered and accepted a six-month lease and contract in February 1973. He filed his suit in this Court on April 3, 1973. He was notified on May 11, 1973 that his lease and contract would be allowed to expire. Plaintiff Freitag filed his suit in this Court on May 18, 1973. By letter dated August 2, 1973, Freitag was notified by Crown that it would not enter into a new lease and contract with him upon the expiration of his present lease and contract on November 25, 1973. The lease and contract of plaintiff Myers were successively renewed for one-year terms in August 1971 and August 1972.

11. After he filed suit on May 18, 1973, plaintiff Myers was offered a Branded Service Station Lease and Dealer Agreement by Crown of the type under which all present Maryland Crown dealers now operate. Myers executed the Lease and returned it to Crown. However, because he believed certain provisions of the lease were illegal, he reserved the right to challenge in this suit the legality of the new lease. For this reason, Crown refused to accept the Lease and Agreement which had been signed by Myers.

12. During the time that plaintiffs have operated their Crown service stations, each plaintiff has devoted substantial efforts and has invested substantial amounts of time and money to promote the sale of gasoline, motor oils and other products at his station. As a result of the efforts of each plaintiff, each has substantially improved the gallonage sales at his service station. Plaintiffs Tumminello and Freitag have received awards and commendations for the attractive appearance of their stations. Gasoline sales at both Freitag's and Phillips' service stations have been

above the average of all Crown dealers in the Baltimore market, and Tumminello's sales have been only slightly below those of the average Crown dealer. Myers' sales have also been satisfactory.

13. Plaintiffs' satisfactory performance as Crown service station dealers has previously been recognized by Crown.

(b) *Findings Concerning Horizontal Price-Fixing*

14. Beginning at least as ealry as 1968, Crown has combined with competing independent suppliers, including, among others, PMC, Hess, Ashland and Meadville, to artificially maintain retail gasoline prices in the Baltimore metropolitan area. Crown has conspired with the above-named suppliers, among others, in the Baltimore metropolitan area, both to eliminate retail price disturbances which threatened to become major price wars, and to initiate joint retail price increases.

15. On the morning of January 26, 1972, Crown District Manager Jack Conway and Crown Sales Representative Michael Corbett visited Crown dealer John Gibson at his service station located at 2650 Patapsco Avenue and discussed with him low retail prices charged by a competing Scot station operated by PMC located at Patapsco Avenue and Potee Street. Conway made a long distance telephone call from Gibson's service station and dialed 202-223-5440, the telephone number of PMC. Conway identified to PMC Retail Sales Manager and Vice President Henry Wainwright the competing Scot service station and complained that it was posting a low retail price. Later that same day, PMC increased the retail price charged at the Scot service station which was then competing with Gibson's Crown station. On other occasions, Conway contacted a representative of PMC for the purpose of effecting joint retail price increases.

16. Similarly, PMC initiated telephone communications with Crown in order to effectuate joint retail price increases at competing Crown and PMC supplied Scot service stations. Joseph Gilboy, Crown District Manager, received repeated requests from representatives of PMC, including Wainwright, to increase retail prices charged at Crown service stations.

17. On various occasions, Gilboy received telephone calls from representatives of PMC informing him that PMC was going to institute retail gasoline price changes at particular Scot stations. On these occasions, Gilboy was given advance notice of future retail price moves by Scot stations, before these price changes were made known to the public.

18. Since 1970, Wilbur G. Pressler, Crown's Manager of Administration, Marketing Department, has repeatedly communicated by telephone with representatives of other independent suppliers, including Irving Grossman of Hess, Joe Davis of Ashland and Joseph Jerome of Meadville, in order to eliminate retail price disturbances within the Baltimore market. Pressler repeatedly telephoned Irving Grossman, who handled the pricing for Hess in Baltimore, to complain about Hess branded service stations which posted lower retail prices in the Baltimore metropolitan area than competing Crown stations. On one occasion, when Grossman attempted to justify a low retail price charged by a Hess service station located on Ritchie Highway by identifying a competing Peco independent service station which was also charging the same price, Pressler told Grossman that the actions of the Peco service station did not justify Hess' low retail price and that Grossman was really reaching out for a reason for a lower price. In the Patapsco Avenue area, a Crown station competed with stations of Midway, Hess and Ashland. Retail prices had been stabilized in that area shortly before January 1973, when the price structure was endangered by a double stamp promotion at the Saveway service station. The Ashland-supplied Bi-Lo service station in the area retaliated by lowering its retail price. Other independent gasoline

marketers, including Crown and Hess, were well aware of the importance of ending the price war on Patapsco Avenue. They feared that major oil companies which supplied stations located in the Patapsco Avenue area would react to the price disturbance by instituting voluntary allowances to their service stations which were losing volume to the discounting independents. If the major oil companies granted such voluntary allowances, such allowances would be in effect over a much larger portion of the Baltimore area and would depress retail prices charged at independent service stations throughout the broad geographic area of the Baltimore market. Crown Vice President Jack Loving instructed Wilbur Pressler, Crown's Manager of Administration, Marketing Department, to telephone Ashland's Vice President Joe Davis, to complain that the Bi-Lo service station was charging low retail prices and thereby threatening the stabilization of retail prices in the Patapsco area. Davis told Pressler that the price reduction at the Bi-Lo station was occasioned by Saveway's glasses or stamp promotion at its Patapsco Avenue station. Pressler also related Crown's complaint concerning Saveway's promotion to Joseph Jerome, Vice President of Meadville, by telephoning Jerome at his office in New Jersey. Pressler told Jerome that he had just spoken with Ashland and further informed him of Ashland's claim that Saveway had precipitated the price disturbance by its promotion at its Patapsco Avenue service station. Pressler felt that a continuation of the price cutting would hurt the entire market, and his intent in making these calls was to eliminate the price competition in the area of western Baltimore.

19. A dealer-operated Crown service station is located near the intersection of York Road and Padonia Road in Timonium, Maryland. This station competed with nearby Hess, Phillips and Scot service stations. Sometime in 1971, in an effort to stabilize retail prices in the area which was then experiencing a price war, some one from Crown's marketing department telephoned the office of Phillips

Petroleum in Maplewood, New Jersey for the purpose of causing the competing Phillips station to raise its retail prices. However, Crown was unable to induce Phillips Petroleum to participate in curing this price depression. It was reported to Crown's Vice President of Sales, J. I. Loving, that the telephone call to Phillips had yielded: "No action. No results. No action."

20. From April 1969 until August 1971, Howard E. Knox was Administrative Aide and Secretary to Theodore Ferguson and Henry Wainwright, officers of PMC. Throughout the term of Knox's employment, PMC engaged in constant communication with its competitors, including Crown, Saveway and others, for the purpose of fixing retail gasoline prices. On orders from Wainwright and Ferguson, Knox personally spoke with Crown District Managers Joseph Gilboy and John Conway. During these conversations, Knox would tell Gilboy and Conway that PMC intended to either raise or lower its prices at a given time and date and in a certain distributing area. Knox would ask if Gilboy or Conway would agree to go along with PMC on its price rise or decrease, as the case might be. In each case that Knox could recall, either Gilboy or Conway called back and told Knox that they agreed. Knox had similar discussions with Mort Sands of Meadville and with representatives of other competing companies, in which he would advise these competitors of an impending Scot price change and would receive assurances that their competing service stations would institute similar price changes. Knox was also instructed to place telephone calls for his superiors. Although Knox did not participate in these conversations, their substance was the same as the calls described as having been made by Knox himself. Because his desk was located close to Ferguson's, Knox was able to frequently overhear Ferguson's conversation with competing gasoline suppliers.

21. While Henry Wainwright was Retail Sales Manager and Vice President of retail marketing for PMC from 1970

to date, he had repeated telephone conversations with representatives of Meadville, Hess and Crown for the purpose of discussing retail prices throughout PMC's marketing area.

22. Since at least as early as 1964 and continuing through 1973, independent gasoline suppliers in the Maryland marketing area have used an industry organization, the Society of Independent Gasoline Marketers of America (SIGMA), as a vehicle to fix and stabilize retail prices charged at independent service stations. SIGMA executives repeatedly telephoned representatives of Crown, PMC and Hess to inform them that certain competing oil companies intended to increase retail prices by a certain amount at a certain time. Pressler of Crown received telephone calls from SIGMA executives Howard Teak and Richard Reynolds, during which they gave him advance notice that particular competitors intended to effectuate price changes. Following such a communication, Crown would increase the retail prices charged at service stations which it supplied.

23. In addition to coordinating retail gasoline price increases among the independent gasoline marketers, including Crown, SIGMA was also utilized to cure smaller pockets of depressed retail pricing. Irving Grossman of Hess utilized SIGMA as an intermediary to complain to his competitors concerning low retail prices which they charged at their service stations. On one occasion, Howard Teak at SIGMA relayed to Mary and Robert Hudson, principals of Hudson Oil Company, at Grossman's request, his complaint that Hudson wanted to destroy local markets by discount pricing. Unlike Crown, PMC, Hess and other independent gasoline marketers in the Maryland area, Hudson refused to participate in efforts of its competitors to cure retail price disturbances, but instead avoided, on most occasions, discussions with SIGMA and its competitors.

24. Beginning at least as early as the spring of 1969 and continuing until at least as late as the summer of 1971, Ferguson and Knox of PMC received various telephone calls from Teak. On occasion, Teak would inform Knox that the major oil companies were "going up" by one or two cents within one or two days. Upon being informed of SIGMA's message, Ferguson would instruct Knox to increase the retail prices charged by PMC's Scot branded service stations by a like amount. In addition, Ferguson would either instruct Knox to telephone the other independent suppliers or would himself telephone them, so that they might increase the retail prices charged at the service stations which they supplied by a like amount at the same time. Among the individuals so contacted by Ferguson or Knox were representatives of Crown, Meadville, Hess and others.

25. During his employment with Crown from 1964 until 1969, plaintiff Tumminello learned that Crown had agreements with other oil companies through which Crown could effectuate joint retail price increases within the Baltimore market. Gilboy informed Tumminello that he had succeeded in increasing retail prices charged by a competitive Field service station in York, Pennsylvania. On several occasions, Crown District Manager Clark Corcoran instructed Tumminello to observe a Scot station on York Road in Baltimore to confirm an increase in its retail prices which would occur at 3:00 P.M. on that afternoon. On each occasion, Tumminello reported to Corcoran that the Scot service station had increased its price as Corcoran had said it would. On occasion, Corcoran assigned Tumminello to observe price changes at a Saveway service station located on Pulaski Highway. In each instance, Tumminello confirmed to Corcoran that the Saveway station had actually changed its retail price as predicted.

26. On November 24, 1970, after becoming an independent dealer, Tumminello was telephoned by Crown office manager Chris Blackman, who instructed him to increase the retail price which he charged for gasoline by one cent

per gallon. Blackman told Tumminello that an agreement had been reached among Crown, PMC, Hess and others to increase the retail gasoline price in Tumminello's marketing area by one cent per gallon at 3:00 P.M. that afternoon. Tumminello telephoned plaintiff Freitag, who at that time managed the company-operated Harford Road Crown service station. Freitag informed Tumminello that he had been instructed by Conway to increase the retail prices charged by the Harford Road Crown station at 3:00 P.M.

27. On at least one occasion, Margaret E. Kling, who was the independent operator of the Crown service station in York, Pennsylvania, from mid-1970 until early 1972, was instructed by Crown representative Donald Head to increase her retail gasoline prices. When Mrs. Kling objected to this increase, Head assured her that competing independent gasoline service stations in the area would be similarly increasing their prices.

28. On other occasions throughout the period during which Tumminello has been a Crown dealer, he has been instructed by Crown representatives that he must increase the retail prices charged at his service station to effectuate agreements reached among Crown and other independent suppliers. In February 1973, Blackman telephoned Tumminello and ordered him to increase his retail gasoline price because an arrangement had been made with competitors for a joint retail price increase. In August 1972, while Tumminello was vacationing in Wildwood, New Jersey, Head instructed Tumminello's attendant, Allen Mech, to increase the retail gasoline prices charged [at] Tumminello's service station. Mech protested that he could not increase retail prices without Tumminello's permission and later that day telephoned Tumminello in Wildwood, New Jersey, to report Head's instruction. Tumminello instructed Mech not to change the retail prices until he returned. The next day, Tumminello learned from Mech that Head had returned to the station and physically changed the retail prices posted at Tumminello's station. When Tumminello telephoned Blackman to complain concerning the price increases, Blackman informed him that various competitors had agreed with Crown to increase the retail price of gasoline, and that the price increase had been in accordance with that agreement.

29. From 1964 until 1973, Irving R. Grossman was marketing coordinator for Hess and was responsible for its pricing throughout Hess' marketing area. Throughout that period, Grossman repeatedly received telephone calls from representatives of various independent suppliers, including Pressler and Garrison of Crown, Ferguson and Curlett of PMC, Mort Sands and Joseph Jerome of Meadville, and Gene Hays and Jack Allard of Ashland, among others, concerning retail price disturbances. Typically, his callers, including Pressler, Cahir and Garrison, would identify by location particular Hess service stations which were posting retail prices lower than those charged by service stations supplied by the caller's company. The purpose of these repeated telephone conversations between Crown and Hess was to minimize price competition between Crown and its competitors. Grossman knew that information was being supplied to him by Crown and other competitors so that Hess would not act unilaterally to lower its retail prices. Grossman also received calls from representatives of Crown and other competitors, informing him in advance of retail price increases which would occur at a specific time. Such increases might relate to service stations which were identified or to broader geographic areas in and around Baltimore.

30. Throughout the period 1964 until 1973, Grossman repeatedly received telephone calls from representatives of SIGMA, including Teak, Teak's successor, Cavin, and Teak's assistant, Reynolds, concerning retail price increases involving Crown and the other independent suppliers in the Baltimore market. Grossman continued to

receive telephone calls from Crown and other independent suppliers and from SIGMA concerning retail price increases until he ceased his employment with Hess in 1973.

31. Donald F. Sheneman has been Mid-Atlantic District Manager for Petroleum Marketing Corporation since March 1972. Throughout that period, Sheneman repeatedly initiated and received telephone calls from representatives of various competing independent suppliers, including Conway, Sterner and others of Crown, Brown of Bi-Lo, Grossman of Hess and Clayton of Meadville, for the purpose of effecting retail price increases and to cure retail price disturbances in the Maryland market. Sheneman had similar conversations with Richard Reynolds of SIGMA.

32. Effectuation of its agreements with other independent suppliers for joint retail price increases for the elimination of pricing conditions which threatened to become major price disturbances required that Crown control the prices at which its dealers, including plaintiffs, sold gasoline at retail to the public. Through such agreements and its policy of fixing its dealers' retail prices, Crown and such other independent suppliers of gasoline have been largely successful in maintaining retail gasoline prices charged by independently supplied service stations at artificially maintained levels. Since as early as March 1970, Maryland has been free of extensive price war conditions. Crown's acts have contributed to the artificial stabilization of the Maryland market.

(c) *Findings Concerning Vertical Price-Fixing*

33. From the time of the inception of Crown's dealer operated multipump service station program, it has been Crown's intention to control the retail gasoline prices charged by independent multipump service station operators.

34. Mr. J. I. Loving, Vice President of Sales of Crown, transmitted a memorandum dated October 9, 1968 to Mr. T. H. Cahir, one of Crown's Regional Managers, which outlined the various conditions and operating procedures under which Crown's independent multipump service station dealers would operate. One of the conditions set forth in the memorandum was that the retail gasoline prices charged at the station in question would be at Crown's discretion.

35. The memorandum of October 9, 1968 provided in pertinent part as follows:

> "Confirming our understanding with respect to the above, it will be satisfactory to conclude an agreement with Mr. Bell [a new Crown dealer] along the following lines:
>
> "(1) Gross gasoline margins of 4.75¢ and 5.25¢ housebrand and premium, respectively. Margins on both grades to escalate up and down ¼¢ per gallon with each 1¢ on the pump (base posting = 29.9¢ and 33.9¢). This does not apply to postings increased due to a tax increase. Minimum margin will be 3.75¢ and 4.25¢. Above understanding to be verbal. Pump postings at Crown's discretion."

36. Before becoming an independent Crown service station dealer, plaintiff Tumminello was employed by Crown as a Sales Representative, and subsequently as a Sales Supervisor. During the period from late 1968 through early 1969, Tumminello was instructed by Crown to explain Crown's operating procedures to the new independent Crown multipump dealers. Tumminello had seen a copy of Loving's memorandum of October 9, 1968. In accordance with instructions from Crown, Tumminello explained to new Crown multipump dealers Donald Bell and William O'Hara that Crown alone would set the retail gasoline prices charged at their respective service stations.

37. On or about May 27, 1969, shortly before he commenced the operation of his station, independent Crown service station dealer John G. Brenner met with Crown Sales Representative George Bamford, and Bamford discussed with him the contents of Loving's memorandum.

38. Crown's method of computing the wholesale price at which its independent dealers purchase gasoline from it differs from the method employed by major gasoline marketers. Major oil companies customarily charge their dealers a predetermined wholesale price, commonly referred to in the industry as a "dealer tankwagon price." When competitive conditions require that the wholesale price to the dealer be lowered, the dealer is granted a discount from the dealer tankwagon price, commonly referred to as a "voluntary allowance." Crown, however, determines the price which it charges its dealers for gasoline by deducting a predetermined margin from the actual retail price to be posted by the dealer.

39. Crown's marketing philosophy is based on the belief that it is economically imperative that Crown dealers post retail prices within approximately two cents of the retail prices posted by Crown's major brand competitors. It is believed that if a Crown dealer were to post a retail price lower than two cents below the major brand competition, the majors might react by lowering their own prices to meet this competition. In such event, other independent competitors of Crown such as PMC, Hess and Meadville might also react by lowering their prices as well, thus precipitating a price war. If a dealer were to raise his prices to a level above the accepted differential, his gallonage sales, and thus Crown's sales, might decrease.

40. In addition, Crown wished to control its dealer retail pricing in order to implement the terms of agreements made between Crown and other competiting gasoline marketers to institute similar retail gasoline price increases at designated times.

41. Internal memoranda of Crown indicate that Crown, on various occasions, required its independent dealers to change their retail gasoline prices at times and by amounts dictated by Crown.

42. Until mid-1973, when Crown revised the form of its leases and dealer contracts, the written instruments under which all independent Crown service station dealers leased their stations from Crown contained a five-day cancellation clause. This clause provided that Crown could terminate the dealer's lease for any reason upon five days' notice to the dealer.

43. Crown was well aware of the effect that the five-day cancellation provision of its leases had upon its dealers and used the cancellation provision to obtain compliance with its pricing policies, including its requirement that Crown alone determine dealer retail gasoline pricing.

44. During the time that plaintiff Tumminello has operated his Crown service station, various Crown representatives have instructed him to raise or to lower his retail gasoline prices to specified levels at specified times. Crown representatives, including Sales Representatives Donald Head and Michael Corbett, and District Managers Edward Gillespie, John Conway and Clark Corcoran, have instructed Tumminello that he could not independently raise or lower his retail gasoline prices without first obtaining permission from Crown. When he objected to Crown's retail pricing directives, Tumminello was threatened with cancellation or non-renewal of his service station lease. In addition, Tumminello was informed by Crown, at the time of various retail price changes, that other competing gasoline marketers had agreed with Crown to institute similar retail gasoline price changes at service stations which they supplied.

45. In November 1970, Chris Blackman, Crown's Regional Office Manager, instructed plaintiff Tumminello to

increase his retail gasoline prices by one cent at 3:00 P.M. that day. Blackman told Tumminello that other competitors had also agreed to raise their retail gasoline prices by one cent at 3:00 P.M. However, plaintiff Tumminello did not change his prices as he was instructed to do by Blackman. Subsequently, Tumminello received a telephone call from Crown District Manager Conway, who told him to increase his retail prices in accordance with Crown's instructions. Conway reiterated that arrangements had been made with other oil companies to effect a uniform price increase. The next day, Tumminello changed his retail gasoline prices as directed to do by Crown for fear of losing his station.

46. In April 1971, plaintiff Tumminello decided to independently lower his retail gasoline prices, without a corresponding reduction in Crown's wholesale price in order to better compete with a nearby competing Esso service station. This Esso service station had been posting retail gasoline prices lower than those posted by Tumminello. Shortly after Tumminello altered his prices, a Crown sales representative visited his station and told him that he could not lower his prices without Crown's approval. After such sales representative left his station, Tumminello received a telephone call from District Manager Conway who instructed him to raise his retail gasoline prices to their previous level immediately or his lease would be cancelled on five days' notice. For fear of losing his station, Tumminello increased his prices to their prior level at 3:00 P.M. that day. The competing Esso service station continued to post retail gasoline prices lower than those posted by Tumminello until at least September 1971, causing a substantial loss of gasoline sales at his station.

47. On one occasion in 1972, a Crown sales representative physically changed the prices posted on Tumminello's gasoline pumps. In August 1972, while Tumminello was away from his station, Crown Sales Representative Donald Head visited the station and told the shift manager, Allen Mech, that the retail prices were going up and to contact plaintiff. Shortly thereafter, Mech telephoned Tumminello and was told not to change the retail prices at that time. Later that evening, Head returned to the station. Mech told Head that Tumminello intended to wait until the next day to raise his prices. Head instructed Mech that everyone was going up and that the prices at Tumminello's station were going to be increased. Head then proceeded to change the pricing mechanism in the gasoline pumps himself while Mech changed the price sign.

48. On February 20, 1973, plaintiff Tumminello received a telephone call from Blackman, who instructed him to raise his retail gasoline prices by one cent because competitors were going to institute similar price increases. Tumminello then spoke to Crown District Manager Edward Gillespie, who confirmed Blackman's statement concerning the intentions of competing gasoline marketers. However, Tumminello did not change his prices in accordance with Crown's instructions at that time. Shortly thereafter, Sales Representative Donald Head visited Tumminello's station and when told that the instruction had been received from Crown to increase the prices, asked him why his prices had not increased. Tumminello told Head that if he increased his prices, he would be posting prices higher than his competition. Head then told Tumminello that his lease was coming up for renewal soon and that if Tumminello did not change the price, he (Head) would have to report it. At 3:00 P.M. the next day, Tumminello raised his prices in accordance with Crown's direction.

49. In early 1973, Tumminello was called to a meeting with Crown District Manager Edward Gillespie and Sales Representative Donald Head at the Friendship Inn. During the meeting, Gillespie told Tumminello that Crown would not renew his existing lease, but would instead give him a lease for only six months' duration because Tumminello had

been a "troublemaker" by not following Crown's pricing policies and by objecting to other Crown policies. Gillespie stated that the basic reason for the six-month lease was because Tumminello always fought Crown on pricing. When Tumminello explained that he had resisted Crown's pricing directives only because they put him in an uncompetitive position, Gillespie told him that if Crown told him to raise his prices, he must do so. Gillespie assured him, however, that if he went along with all of Crown's policies and did not argue about changing prices when Crown instructed him to do so, his lease would be extended for another year at the expiration of this six-month term.

50. During the time that plaintiff Phillips has operated his Crown service station, Crown representatives have instructed him when to raise and when to lower the retail gasoline prices posted at his station. Phillips was aware that if he did not obey these instructions, his service station lease might be cancelled on five days' notice or might not be renewed. On several occasions when Phillips was instructed to change his prices by Crown, he was also informed that competing service stations would be instituting similar price changes.

51. On May 17, 1971, Crown District Manager John Conway telephoned Phillips and ordered him to lower his retail gasoline prices by one cent, effective at 3:00 P.M. that day. In an effort to delay reducing his price, Phillips told Conway that he did not know how to change the pricing mechanism. Conway told Phillips that if he was going to remain a Crown dealer, he would have to learn to change his retail gasoline prices when Crown told him to change them. Phillips changed his prices as instructed.

52. On one occasion during the summer of 1971, Crown Sales Representative John Nugent visited Phillips' station and told the attendant that Crown had decided to raise the retail price of gas. Nugent told the attendant that a competing service station would be similarly increasing its prices. Plaintiff increased his retail gasoline prices as instructed by Crown. However, his competition did not increase his prices. Plaintiff complained to Conway and asked for permission to lower his prices, which was later given to him. Plaintiff then lowered his prices.

53. As a result of his resistance to Crown's pricing directives and other restrictive marketing policies, plaintiff Phillips, like plaintiff Tumminello, was called to a meeting attended by Sales Representative Head and District Manager Gillespie. This meeting, held on December 19, 1972, was convened only five days after Crown had discovered plaintiff Phillips selling Quaker State motor oil out of his back room. During the meeting, Gillespie informed Phillips that his present service station lease was being cancelled and that he was being given a "probationary" lease of only six months' duration. Gillespie also informed Phillips during the meeting that a Crown dealer in Rockville was going to be terminated because he did not set retail prices at levels specified by Crown.

54. During the time that he has been a Crown service station dealer, plaintiff Freitag has been similarly instructed by various Crown representatives to raise or to lower his retail gasoline prices. On several occasions, plaintiff was told by Crown that efforts were being made to effect similar price changes at competing service stations. Crown representatives also instructed Freitag that unless he posted the retail gasoline prices dictated to him by Crown, his service station lease would be terminated or would not be renewed.

55. At the time that Freitag commenced the operation of his station, nearby competing Fisca and Red Head service stations were posting retail gasoline prices equal to those posted by him. However, by the end of January 1971, those stations had lowered their prices two cents below Freitag's prices. Throughout the period from mid-January until May

or June of 1971, Freitag continually requested permission from his Crown Sales Representatives and District Manager Conway to lower his retail prices to meet his competition, even though Freitag did not expect Crown to lower its wholesale price to him. On each occasion permission was refused. In response to several of these requests, Conway told Freitag that he had been in contact with the suppliers of the competing Fisca and Red Head stations in an effort to cause those stations to raise their retail gasoline prices.

56. In July 1971, Freitag was instructed by a Crown employee to raise his retail gasoline prices by three cents. When he objected, Freitag was told that competing Red Head and Fisca service stations in his area were also going to increase their retail gasoline prices by the same amount. Freitag did raise his prices as he was instructed to do by Crown and subsequently noticed that the nearby Fisca and Red Head service stations did increase their prices as Crown had indicated they would.

57. On October 25, 1972, Freitag unilaterally raised his retail gasoline prices by two cents, even though he had not obtained prior permission from Crown. That night, Sales Representative Head observed Freitag's unilateral price increase and telephoned District Manager Gillespie at sometime after midnight to inform him of Freitag's price move. The next day, Head visited plaintiff's station and told him that Crown management was disturbed about the price increase. Shortly after this conversation, Freitag reduced his prices.

58. Crown has imposed the same pricing restrictions upon plaintiff Myers as have been imposed upon the other plaintiffs. During the time that Myers has operated his Crown service station, various Crown representatives have instructed him to raise or lower his retail gasoline prices. It has been made clear to Myers that unless he followed Crown's policies, including pricing, he would lose his service station. He has also been instructed by Crown that he

is not permitted to independently change his retail gasoline prices without first obtaining permission from Crown.

59. In late July 1971, Crown instructed plaintiff Myers to increase his retail gasoline prices by two cents. Myers raised his price in accordance with Crown's instructions, but then observed that his retail gasoline prices were higher than those posted by a nearby Crown service station operated by plaintiff Phillips. Following this price increase, Myers noticed that his gallonage sales were decreasing. He also found that many of his customers were complaining about the higher prices and were indicating that they would, in the future, purchase gasoline from plaintiff Phillips. Myers then telephoned Crown District Manager John Conway, informed him of his decreasing gallonage and customer dissatisfaction and requested permission to lower his retail gasoline prices. Permission was refused.

60. In July 1972, Myers was instructed by Crown to raise his retail gasoline prices by one cent, which he did immediately.

61. On August 10, 1972, Crown Sales Representative Michael Corbett telephoned Myers at his home in the evening and informed him that Crown's wholesale gasoline price would be increased by three-quarters of a cent and asked whether Myers had the proper numerals to post on his large price sign to reflect his new retail gasoline prices. Corbett also indicated that the price increase would include other oil companies. The next day, Crown Office Manager Chris Blackman reiterated Corbett's pricing instructions to Myers. However, Myers did not increase his prices at that time. Later in the day, Myers complained to Crown Manager of Administration, W. G. Pressler, about the fact that his competitors had not increased their prices, but was told again that the price increase would include other oil companies. In order to offset his loss of gallonage resulting from the price increase, Myers raised his retail price for

Crown regular gasoline by two cents, thus increasing his margin of profit. The next day, Sales Representative Corbett visited Myers' station and asked him why he was posting a retail gasoline price one cent above Crown's "suggested" price. Later, he received a telephone call from Blackman, who stated that he thought Myers did not understand Crown's pricing program. Blackman explained that Crown was "suggesting" a price one cent lower than that actually posted by Myers. On August 14, 1972, Myers met with Phillip Sterner, Crown Regional Manager. During the meeting, Sterner suggested to Myers that he lower his price to conform to Crown's suggested price and state that if he did not do so, Crown management would think him to be a "wise guy". The next day, Sterner visited Myers' station and after observing that Myers had not changed his price, told Myers that he thought he had agreed to lower his price to the level suggested by Crown. Shortly after Sterner's visit, Myers lowered his price.

62. Other present and former independent Crown service station dealers have been subjected to the same pricing restrictions as have been imposed upon plaintiffs. Crown has required that these present and former dealers post only the retail gasoline prices authorized by Crown and has made clear to each of these dealers that deviation from Crown's pricing policies would jeopardize their continued occupancy of their stations.

63. David Horner was the independent operator of the Crown service station located at 6315 Reisterstown Road from September 1970 until late April 1974. Ever since he became a Crown service station dealer, Horner was instructed by Crown when to raise and when to lower his retail gasoline prices. He understood that he was required by Crown to change his prices as he was instructed to do. With one exception, Horner always followed Crown's pricing directives.

64. On August 23, 1973, Horner received a telephone call from Crown Sales Representative Sylvester Bollinger, who recommended that Horner reduce his retail gasoline prices because Crown was going to reduce its wholesale price at that time. However, Horner decided to leave his retail prices at their existing levels and thereby enjoy a greater margin of profit. On August 24, a Crown employee telephoned one of Horner's employees to determine his retail gasoline price postings. Later that day, Horner received a telephone call from Crown District Manager Edward Gillespie, who asked him to lower his price. Horner told Gillespie he intended to leave his prices at their prior levels over the weekend in order to obtain a greater margin of profit but would consider reducing his prices following the weekend. Gillespie then reiterated his request that Horner lower his prices. On August 25, Horner was visited at his station by the President of Crown, Henry Rosenberg, who asked Horner, "What's with the price?" After Horner explained his reasons for not reducing his prices to levels suggested by Crown, Rosenberg told him that he had been away from the station a lot lately. That night, Horner's station was inspected by Crown Sales Representative Lee DelPrete. Horner received the first unsatisfactory inspection report which he had ever received since becoming a Crown dealer. Horner lowered his prices to levels recommended by Crown the following Monday morning.

65. William J. O'Hara has been the independent operator of the Crown service station located at 10615 Reisterstown Road, Owings Mills, Maryland, continuously since December 8, 1968. During the time that he has operated his service station, he was instructed when to raise and when to lower his retail gasoline prices. He was told that Crown alone would determine his retail posting, and because of threats which he received from Crown, O'Hara refrained from posting retail prices other than those dictated by Crown.

66. Shortly before commencing the operation of his service station, O'Hara attended a meeting at the Crown district office on Pennington Avenue, Baltimore, Maryland. During this meeting, Crown Regional Manager Thomas Cahir, District Manager Clark Corcoran and Sales Representative Tumminello informed O'Hara that Crown would set and control the retail price of gasoline sold at his station.

67. In the spring of 1970, O'Hara was told by a representative of Crown to raise his retail gasoline prices by one cent. O'Hara objected to this increase, claiming that he would lose business to a competing Hess station. He was told that Crown had already talked Hess into going up. O'Hara did as instructed, but during the following months observed that his station was losing gallonage to the competing Hess service station which posted lower prices than O'Hara's. During this time, O'Hara was visited by Crown's President, Henry Rosenberg. O'Hara complained to Rosenberg of his loss of gallonage and was told that Crown was working on the situation.

68. In July 1971, District Manager Conway telephoned O'Hara and instructed him to increase his retail gasoline prices by two cents at 3:00 P.M. that day. O'Hara objected, telling Conway that such an increase would make him two cents higher than a competing Hess station. Conway told him not to worry because Crown had already talked to Hess and they were going to go up, too. O'Hara increased his price as instructed at the appointed time, but Hess did not change. Later that night, Sales Representative Donald Head telephoned O'Hara and instructed him to drop his retail gasoline prices by one cent immediately. O'Hara again changed his prices as instructed by Crown.

69. In August 1973, Crown Sales Representative Lee DelPrete telephoned O'Hara and told him that Crown was going to reduce its wholesale gasoline price by three-quarters of a cent and suggested that O'Hara reduce his retail gasoline price by one cent. O'Hara objected to this price change, and told DelPrete that he would not change his prices without doing some checking. At 11:30 that night, DelPrete again telephoned O'Hara and asked if he had changed his mind about lowering his prices. Again, O'Hara told DelPrete that he would not lower his price. DelPrete informed O'Hara that he would submit to Crown a report containing the names of all of those Crown dealers who did not move their prices. The next day, Crown District Manager Edward Gillespie telephone O'Hara and asked why he would not lower his price in accordance with Crown's instructions. A heated argument ensued, during which Gillespie cursed at O'Hara and told him to do what he wanted but that his (Gillespie's) day would come. The following day, O'Hara received an unacceptable service station inspection report, one of only a few such unacceptable reports that he had received in six years. O'Hara then lowered his price to that suggested by Crown. Several days later, O'Hara received an acceptable service station report.

70. During the period from mid-1970 until early 1972, Margaret E. Kling was the independent operator of the Crown service station in York, Pennsylvania. Throughout the time that she operated her Crown service station, Mrs. Kling was told by Crown representatives when to raise and when to lower her retail gasoline prices. A sales representative would telephone Mrs. Kling and tell her to raise her retail gasoline price at a particular hour, such as 3:00 P.M. Mrs. Kling was also told by Crown that she was required to post only retail gasoline prices dictated by Crown and could not independently raise or lower her retail gasoline prices. She was told that she should follow these instructions or lose her station.

71. The Branded Service Station Lease and Dealer Agreement which Crown offered to plaintiff Myers is iden-

tical in form to the Leases and Dealer Agreements executed by all present Maryland Crown service station dealers. This Lease and Dealer Agreement provides, in relevant part:

> "6. MINIMUM GALLONAGE: Dealer agrees not to sell less than —— gallons of motor fuel during any calendar month and not less than twenty percent (20%) of such monthly quantity during any week (Sunday through Saturday).
>
> In the event Dealer has failed to sell the above minimum quantities of motor fuel during any applicable period, for reason other than those beyond reasonable control of Dealer as provided in Paragraph 8, Crown may, in its absolute discretion, immediately terminate this Agreement without further demand, upon giving Dealer written notice of such termination, which notice shall not be less than is required by applicable state law, if any.
>
> * * * * * *
>
> "9. PRICES: Prices for respective products shall be
>
> > (a) Motor Oils and Automotive Products: Crown's established dealer price in effect at the time and place of each delivery.
> >
> > (b) Motor Fuels: The higher of (1) The minimum price for each of the respective grades of motor fuel as specified from time to time by Crown at or before the delivery of such motor fuel to the Dealer; or (2) The Actual Pump Price (after deduction of Federal, State and Local Excise and Sales Tax, if any) charged by the Dealer, less the applicable Dealer Discount as stated in Exhibit 'B';"

72. The pricing provisions contained within the new Lease and Dealer Agreement essentially continue Crown's

pricing policies which have been in effect since the beginning of Crown's dealer multipump program.

73. Crown's purpose in adopting the pricing provisions set forth above and the necessary effect of those provisions are to preclude independent Crown service station dealers from posting retail gasoline prices other than those designated by Crown. Under the terms of the Lease and Dealer Agreement, were a dealer to post prices higher than those suggested by Crown, Crown would automatically raise the wholesale price at which the dealer purchased gasoline from Crown. Thus the dealer would be deprived of additional profit that he might make by reason of the price increase.

74. Were a dealer to independently raise his gasoline prices above levels suggested by Crown, his gallonage sales would normally decrease. Under the terms of the new Lease and Dealer Agreement, however, were the dealer's sales to decrease in any seven-day period to less than twenty percent of his stated monthly gallonage, Crown may, in its discretion, terminate the dealer. Thus, under the new Lease and Dealer Agreement, a dealer risks termination if his price increase causes his gallonage sales to fall below the prescribed level within the seven-day period.

(d) *Findings Concerning Motor Oil Sales*

75. Crown desired all of the motor oil business of independent Crown dealers.

76. Crown required all of its independent multipump service station operators to carry only Crown brand motor oils, and prohibited Crown dealers from carrying other brands of motor oils.

77. In order to obtain a lease of a Crown multipump service station, it was necessary for a dealer to agree to purchase and sell only Crown motor oils. Crown's policy has been set forth in Dealer and Equipment Loan Contracts

signed by each plaintiff, which provided under the heading "Products" that the dealer agrees to purchase only gasoline and motor oil products marketed by Crown.

78. Crown Sales Representatives and Crown District Managers enforced this motor oil policy by insisting that dealers purchase and sell only Crown brand motor oils, in various instances threatening termination of dealer leases when dealers resisted this requirement.

79. In 1969, plaintiff Frank Tumminello requested permission of Crown to sell Quaker State motor oil as a supplement to this Crown sales, in order to fulfill requests of customers who desired Quaker State. Crown District Manager Clark Corcoran and Regional Manager Thomas Cahir informed plaintiff that he could not sell Quaker State motor oil, but must sell only Crown motor oils.

80. In 1970 or early 1971, plaintiff Charles Freitag, in response to certain customer preferences, requested of Crown District Manager John Conway permission to offer Quaker State motor oil as a supplement to his Crown sales. Conway told Freitag that he could not do so and must sell only Crown brand motor oils.

81. During a period of time in 1971, when Crown was unable to supply its independent dealers, including plaintiff Carroll Myers, with sufficient quantities of Crown motor oils, Myers requested permission to supplement his Crown stock with Quaker State motor oil. Crown denied him permission to sell Quaker State at his station.

82. In March 1973, Crown District Manager Edward Gillespie met with plaintiff Myers to discuss his status as a Crown dealer. During this meeting, Gillespie made it clear to Myers that he would be jeopardizing his position with Crown were he to follow the example of Crown dealer John Phillips, who was selling and advertising the sale of Quaker State motor oil.

83. In late 1972, Crown was not furnishing plaintiff John Phillips with a 10W30 grade motor oil. Phillips decided to offer his customers a 10W30 grade motor oil, and, in response to customer requests for Quaker State motor oil, he began to sell Quaker State 10W30 grade motor oil as a supplement to his line of Crown motor oils. He stored his stock of Quaker State in the back room of his station. He did not display any Quaker State Oil on the oil display racks adjoining his gasoline pumps. He feared he would risk his Crown dealership if Crown discovered that he was selling Quaker State motor oil. On December 14, 1972, Crown Sales Representative Donald Head discovered that Phillips was selling Quaker State motor oil, and on December 19, 1972, Phillips was called to a meeting with District Manager Edward Gillespie and Donald Head. At this meeting, Gillespie informed Phillips that his lease and dealer agreements were being cancelled and that he was to be placed on only a six-month lease. Gillespie told Phillips that he was being placed on probation, and put before him a copy of Crown's "Standards of Service Station Operations", which he instructed Phillips to read and sign. The Crown "Standards" prohibited Crown service station dealers from marketing or promoting any products not specifically authorized by Crown.

84. In December 1972, when Phillips was placed on probation, he was selling Quaker State out of his back room, but until that time, had never displayed Quaker State motor oil or advertised the sale of Quaker State motor oil.

85. On February 27, 1973, Phillips first undertook the promotion of his Quaker State motor oil sales. He placed Quaker State motor oil on the display racks at his station, and he set up the standard small Quaker State curb sign. On the following day, District Manager Gillespie visited Phillips' station and discovered this promotional activity. On the telephone on that same day, Gillespie informed Phillips that, by selling Quaker State, he was in violation

of his Crown Dealer and Equipment Loan Contract. He told Phillips that he was not permitted to sell products other than those authorized by Crown, and he told Phillips that he was in violation of Crown's "Standards". Gillespie indicated to Phillips that if he continued his marketing of Quaker State, he would be evicted from his station in July 1973, which was the end of Phillips' probationary term.

86. Crown District Manager John Conway and Sales Representative Donald Head instructed Crown service station dealer Margaret Kling that she would not be permitted to sell motor oils other than Crown brand motor oils, and could not sell Quaker State motor oils at her Crown station. In order to satisfy certain customers who requested to purchase Quaker State motor oils, Mrs. Kling stocked a small amount of Quaker State motor oils in the back room of her service station, but did not display Quaker State motor oils at the pump islands. On one occasion, Crown Sales Representative Donald Head discovered Quaker State motor oils in Mrs. Kling's back room and told her that she could not have that oil at her station. Head instructed Mrs. Kling that she would not be permitted to sell Quaker State oil at all.

87. In the latter part of 1972, Crown increased the wholesale price of Crown motor oils, that is, the price paid to Crown by independent Crown dealers. Shortly thereafter, Crown prepared permanent-type, plastic motor oil price signs for display, bearing the motor oil prices set by Crown for each grade of Crown motor oils. The aim of Crown's policy was to achieve uniform motor oil prices at Crown stations.

88. Crown instructed independent Crown dealers concerning the prices to be charged for Crown brand motor oils. In early 1973, Crown Sales Representative Donald Head told plaintiff Tumminello the prices which Crown wanted him to charge for Crown motor oils. Tumminello told Head he did not want to charge these prices, and Head replied that Tumminello's lease was coming up for renewal and Tumminello was doing nothing to help himself by refusing to go along with Crown's motor oil price policy. Tumminello again refused. Shortly thereafter, Head returned to Tumminello's service station with the price signs and Head gave Tumminello a choice: Tumminello could post the prices specified by Crown, or Head would place Tumminello's name on a Crown "blacklist" to be sent to higher Crown authority, thus placing his dealership in jeopardy. Sales Representative Donald Head advised plaintiffs Phillips, Freitag and Myers of Crown's requirement that all service station dealers post uniform motor oil prices.

(e) *Findings Concerning Restrictions on Antifreeze, Vending Machines and Vending Machine Products*

89. Crown has designated the antifreezes which its dealers may sell and has prohibited the sale of other antifreezes. From mid-winter of 1970-71 until the mid-winter of 1972-73, Crown required its dealers to purchase only Prestone brand antifreeze. This policy was set forth in Crown interoffice memoranda and directives. On December 3, 1970, Crown District Manager John Conway issued a directive on antifreeze, pertaining to all multipump stations, advising his Sales Representatives that only Prestone antifreeze was to be sold at such Crown stations. Crown had previously permitted dealers to purchase and sell other brands of antifreeze, including RPS and Xerex brand antifreezes. The policy announced on December 3, 1970 required dealers to sell out their remaining stocks of antifreeze and thereafter to sell only Prestone. Crown supplied Prestone to dealers.

90. In December 1972, Crown distributed to its dealers its "Standards of Service Station Operations". These "Standards" provided that Prestone and Xerex antifreeze in factory packaged quart containers were the only anti-

freeze products which could be sold or offered for sale at Crown stations. These "Standards" are now embodied in Crown's new 1973 Lease and Dealer Agreement.

91. Crown has conditioned the lease of Crown multipump service stations to dealers upon the express requirement that Crown dealers purchase and sell only antifreezes specified by Crown. Crown derives no profit from the sale by its dealers of Prestone and Xerex antifreeze.

92. With regard to vending machine items, during the period when multi-pump stations were company operated, Crown developed a promotion whereby cigarettes were sold at 30 cents per pack through machines owned by Crown. The purpose was to draw customers to the Crown stations who would then buy gasoline. The 30-cent cigarette promotion proved effective in building gallonage, and as dealers took over operation of Crown multipump stations, it was continued.

93. In 1969, Crown entered into an agreement with Select Vending Company, a vending machine company operated by Austin Fine, a friend of Crown Central Petroleum President Henry Rosenberg. The agreement provided for an agreed-upon retail price for cigarettes, and for the paying of no sales commissions to Crown or to Crown dealers. The agreement was summarized and embodied in a letter from Thomas Cahir to Austin Fine, dated September 19, 1969.

94. Fine accepted the original agreement, involving the sale of cigarette products at a promotional price, with the expectation that he would receive from Crown the right to control all vending machine business at Crown stations. The original agreement afforded to Select Vending Company this control with respect to cigarette vending machines and candy machines at Crown service stations. Later in 1971, when Select Vending Company began to market soda vending machines, Crown determined that Select should be the sole soda machine supplier at Crown stations.

95. In late 1972, Crown issued to its dealers its "Standards of Service Station Operations". These "Standards" reiterated Crown's verbal instructions to its dealers. The "Standards" provided that the dealer could utilize only vending machines furnished by a vending machine supplier designated by Crown.

96. In 1973, Crown's objectives were embodied in its new Lease and Dealer Agreement. Such 1973 Lease and Dealer Agreement specifically sets forth the requirement confining dealers to the services of Select Vending Company. Addendum Number 1 to the new Lease provides that Crown reserves a portion of station premises to itself, and that, pursuant to an agreement dated June 21, 1973, with Select Vending, Crown has awarded all rights to install, operate and maintain vending machines at the station to that company.

97. A part of the 1973 Lease and Dealer Agreement is a copy of the contract executed by Crown and Austin Fine, trading as Select Vending. This contract provides that Crown grants to Fine the "sole exclusive right to place, maintain and operate" vending machines at Crown service stations. In return for this right, Fine has agreed to pay Crown a commission of one cent per package on cigarettes, which commission is then paid or credited to Crown dealers. Crown thus derives no profit from the sale of cigarettes, candy or soda through vending machines.

98. Crown has conditioned the lease of Crown multipump service stations to dealers upon the express requirement that Crown specifies the supplier of vending machines at Crown service stations.

DISCUSSION

(a) *Horizontal Price-Fixing*

The reach of the Sherman Act is extensive, and any concerted activity the goal of which is to fix, raise, depress or maintain prices is unlawful *per se*. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-224, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). Thus, stabilizing prices as well as raising them is within the ban of Section 1 of the Sherman Act. United States v. Container Corporation of America, 393 U.S. 333, 337, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969). Any combination of competitors which tampers with price structures is engaged in unlawful activity, and even though members of a price-fixing group are in no position to control the market, to the extent that they stabilize prices they directly interfere with the free play of market forces. United States v. Container Corporation, *supra* at 337, 89 S.Ct. 510.

Gasoline is a fungible commodity, and price is the most important competitive factor for a retail service station. Gray v. Shell Oil Company, 469 F.2d 742, 744 (9th Cir. 1972). This is particularly true insofar as Crown and other competing independent companies in the Baltimore metropolitan area are concerned. These independents do a discount type of business and generally sell at prices lower than those charged at service stations supplied by major oil companies.

The record in this case indicates that since the late 1960's, Crown and several of its competitors were jointly committed to a policy of avoiding "gas wars" in the Baltimore marketing area. Moreover, the evidence shows that these independent companies were quite successful in their efforts. Representatives of Crown who testified in this case were proud of the price stability which had been achieved in and around Baltimore in the late 1960's and early 1970's. However, the efforts undertaken jointly by these competitors to stabilize gasoline prices run afoul of Section 1 of the Sherman Act. The elimination of competitive evils such as price-cutting or other ruinous competition is no legal justification for a combination entered into between competitors for the purpose of stabilizing prices. *See* United States v. Socony-Vacuum Oil Co., *supra* at 220-221, 60 S.Ct. 811.

The evidence in this case goes well beyond the mere exchange of price information among competitors.[6] What has been shown by the totality of the evidence is that from the late 1960's when Crown began its multipump dealer program until the date these suits were filed, Crown has continually agreed with its competitors to increase the retail prices of gasoline sold at stations supplied by it and to take other joint actions to eliminate local depressed pricing conditions.[7] Crown and certain of its competitors exchanged information about impending price changes, and each company knowingly acted on information previously received from competitors in setting the retail prices of gasoline sold at its stations. Crown and its competitors acted in concert to correct price disturbances in certain local areas in order to avoid price competition from major oil companies as well as from other independent companies. As a result of these illegal activities on the part of Crown and its competitors, retail gasoline prices charged by these independent service station dealers in the Baltimore metropolitan area have been stabilized and maintained at artificial levels during the years in question.[8]

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[6] The evidence in this case does not support Crown's contention that its communications with competitors were a good faith effort to comply with the antitrust laws pursuant to Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C. § 13(b).

[7] No evidence was produced of similar agreements to fix wholesale prices, and this Court does not find that Crown engaged in a horizontal conspiracy to fix wholesale prices.

[8] There can be little doubt that Crown's anticompetitive conduct had a substantial effect on interstate commerce. *See* Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391, 395 (4th Cir. 1974). Crown was fifth in the State in gasoline sales, and its stations sell over 60 million gallons annually in the Baltimore metropolitan area.

This is not a case in which plaintiffs were compelled to rely solely on circumstantial evidence of illegal concerted activity. In this case, there has been direct testimony of agreements reached between Crown and competitors to raise or stabilize retail prices. Particular weight has been accorded the testimony of Howard E. Knox, who, between 1969 and 1971, was Administrative Assistant and Secretary to the President of PMC, a competitor of Crown. Knox testified concerning various conversations between representatives of his company and representatives of Crown and of other companies in which agreements were reached to raise or stabilize the retail prices of gasoline. The testimony of the witness Knox was supported by that of various other witnesses, including several of the plaintiffs themselves and several other Crown dealers who had become aware of price-fixing agreements between Crown and its competitors.

From the time it began its multipump program, the wholesale price which Crown charged plaintiffs and other dealers had a direct, fixed relation to the retail price which the dealers charged their customers. In fact, Crown did not determine the wholesale prices to be charged its dealers on the basis of general competitive factors in the wholesale market. Rather, Crown first decided what the retail price of its gasoline should be and then worked back to the wholesale price it would charge the dealer.

This fixed and constant relationship between wholesale and retail prices was spelled out in the new Lease and Dealer Agreement adopted by Crown in 1973, as discussed more fully hereinafter. The new Lease did no more than reduce to writing a policy which had been in effect for a number of years. What is apparent from such a policy is that Crown's financial planning and projections focused on the retail price of its product. Thus, it was imperative for Crown to take steps to fix and stabilize retail prices charged in its market area so that it might maximize the

profits it derived from sales at wholesale. If Crown would have been unsuccessful in persuading a competitor to raise its retail price to the level being charged by Crown and other competitive stations, Crown would then have been compelled to permit its dealer to charge a competing price and would then have had to reduce its wholesale price to such dealer.

Occasionally, a competitor would not go along with this illegal scheme and would draw the ire and scorn of Crown and other independent companies. On some occasions, Hudson Oil Company refused to agree with the others to raise or stabilize its retail prices. Hudson was thus described as a "difficult competitor" by a representative of one of the conspirators, who further testified that one could not determine how far Hudson would go to "destroy the market". On one occasion District Manager Joseph Gilboy of Crown engaged in a "hot" telephone conversation with a representative of Hudson, during which Gilboy was unsuccessful in persuading the Hudson representative to raise its retail prices to those being charged by a competing Crown service station.

In comparison with the readiness of competing independent companies to supply Crown with information about impending price changes, major oil companies rebuffed attempts by representatives of Crown to discuss retail prices. James C. Blackman, who is Regional Office Manager of Crown for the Mid-Atlantic Region, testified that major oil companies would not talk to him when he telephoned in an attempt to discuss retail prices. Blackman was told by a representative of Exxon in 1970 that such company could not reveal pricing information and that "We don't discuss pricing information, whatsoever, over the telephone."[9]

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[9] A representative of Shell told him the same thing.

In an unusual post-trial effort to avoid the damaging testimony of the witness Knox, Crown has filed a motion to strike such testimony in its entirety, relying on a post-trial deposition of this witness taken in another case. In the alternative, Crown asks that this Court, in evaluating the credibility of the witness Knox, consider such deposition as a part of the record in this case.

Crown has cited no case in which a court has stricken the testimony of a witness given in open court at a trial because of later deposition testimony of the witness in another case. Final argument in this case was heard on January 31, 1975. On February 13, 1975, the deposition of Knox was taken in Petroleum Marketing Corporation v. Midway Petroleum, Inc., Civil No. 73-79-N and Midway Enterprises, Inc. v. Petroleum Marketing Corp., Civil No. 73-1178-N, which are private actions pending in this Court involving antitrust claims similar to some of those here.[10] Knox had testified in this case on November 14, 1974. Armed with a transcript of the testimony Knox gave at this trial, counsel for PMC questioned Knox closely at the subsequent deposition concerning all aspects of his testimony that PMC had conspired with Crown and other independent oil companies to fix and stabilize prices in the Baltimore area.

If Crown's motion is considered to be in the nature of a motion for a new trial based on newly-discovered evidence, it would clearly fail. To succeed in such a motion, the moving party must establish that the evidence was such that it could not have been discovered by the exercise of diligence in time to be presented in the original proceedings and that the evidence was not merely cumulative or tending to impeach or contradict a witness. United States Fidelity & Guaranty Co. v. Lawrenson, 334 F.2d 464, 466 (4th Cir.), cert. denied 379 U.S. 869, 85 S.Ct. 141, 13 L.Ed. 2d 71 (1964); Stiers v. Martin, 277 F.2d 737 (4th Cir. 1960).

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[10] Plaintiffs' counsel here also represented Midway in those other cases. However, when such counsel appeared at the deposition of February 13, 1975, they were representing Midway in those cases and not these plaintiffs in this case.

What might be considered "newly-discovered evidence" here resulted from a deposition taken in other litigation after the trial in this case was concluded. When Knox testified in this case, counsel for Crown had in their possession a copy of an affidavit of Knox indicating the nature of his testimony. It does not appear that Knox's deposition was taken in this case, but no reason appears why that could not have been done before he testified at the trial on November 14, 1974. The evidence now relied upon by Crown was in existence at the time of the trial in this case and could have been discovered by the exercise of due diligence by Crown's attorneys. *See* Butts v. Curtis Publishing Co., 242 F.Supp. 390, 392 (N.D.Ga.1964), aff'd 351 F.2d 702 (5th Cir. 1965), aff'd 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). In any event, the deposition testimony of Knox in the other case would merely be impeaching, even if this Court were to agree that it should be a part of the record here.

Moreover, even were such deposition testimony of the witness Knox to be considered by the Court in this case, it would not affect the weight which this Court had accorded the trial testimony of the witness Knox. Many of the claimed differences between the later deposition testimony and the trial testimony are not inconsistencies at all when the testimony given by the witness on these two occasions is considered in its entirety. Other differences claimed by Crown to exist relate to minor matters and do not detract from Knox's testimony at the trial concerning the elements of the illegal conspiracy. The witness appeared live at the trial and the essence of his testimony is supported by other evidence in the case.

This Court concludes that the deposition in question is not properly a part of the record here. This Court further concludes that even if it were, such deposition testimony would not in any event affect the weight which has been given to Knox's trial testimony. For these reasons, Crown's motion to strike or disregard the testimony of the witness Knox will be denied.[11]

(b) *Vertical Price-Fixing*

Resale price-fixing is a *per se* violation of the Sherman Act, whether done by agreement or combination. Albrecht v. Herald Co., 390 U.S. 145, 151, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213, 71 S.Ct. 259, 95 L.Ed. 219 (1951); Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F.Supp. 945 (S.D.Texas 1972). It was established many years ago that written contracts with customers obligating them to sell at prices fixed by the vendor are void because they violate the Sherman Act. Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911). Moreover, an unlawful combination exists when a defendant enters into such an agreement which may be implied from a course of dealing with a customer or from other circumstances which bind the customer to observe fixed resale prices. United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99, 40 S.Ct. 251, 64 L.Ed. 471 (1920).

In United States v. Parke Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), the Supreme Court held that an illegal combination to fix prices results if a seller suggests resale prices and secures compliance by means in addition to the mere announcement of the policy and a simple refusal to deal. As noted by the Supreme Court in *Albrecht, supra* at 149, 88 S.Ct. 869, the illegal combination with retailers in the *Parke Davis* case arose because their acquiesence in the suggested prices was secured by threats of a termination of dealing. Thus, if a retailer unwillingly complies with a wholesaler's suggested or recommended price, he may properly claim that an illegal combination exists under Section 1 of the Sherman Act. *See* Albrecht v. Herald Co., *supra* at 150, n. 6, 88 S.Ct. 869; United States v. Parke Davis & Co., *supra*. With specific reference to the industry involved here, it has been held that a supplier of gasoline like Crown may not use coercion on its retail outlets to achieve resale price maintenance, and it does not matter what the coercive device is if its effect is to fix such prices. Simpson v. Union Oil Co., 377 U.S. 13, 17, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964).

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[11] An Order to such effect has this date been entered.

The evidence in this case indicates that during the period involved here, Crown fixed and controlled the retail prices at which its dealers, including the plaintiffs, resold gasoline to the public. The plaintiffs and other dealers have been forced by means of threats and other coercive practices to post retail gasoline prices determined by Crown. The plaintiffs were threatened with the termination or nonrenewal of their service station leases when they objected to Crown's illegal pricing policies, and because of their desire to set their own retail prices and to otherwise act independently, they were eventually notified that their leases would not be renewed.

Since 1968, when Crown changed from company-owned to dealer-operated stations, its basic policy has been to fix the retail prices at which its gasoline would be sold in Maryland. The findings in this case of an illegal horizontal combination between Crown and certain competitors directly complement and support the findings of illegal vertical agreements with dealers. To carry out its agreement with competitors to fix and stabilize prices in the Baltimore area, its was necessary for Crown to control the prices charged by its dealers. Quite obviously, Crown could not fulfill its undertakings with competittors if its dealers were truly independent insofar as their retail price structure was concerned.

Before 1968, when Crown owned and operated the stations, it had of course itself fixed the retail prices of gasoline. And it continued to do so after converting to a multipump operation. Its corporate officers were firmly committed to the view that Crown alone knew what prices should be charged by its "independent" dealers for the maximization of their and Crown's profits. Indeed, as noted previously, Crown's wholesale price was determined from the retail price, and its officers thus desired to fix the retail price in accordance with their own understanding of the market rather than that of each dealer.

But whether or not Crown possessed the resources, expertise and know-how which might make it as supplier-landlord better able than any retailer-lessee to determine the optimum retail price in a particular area, its policy was in clear violation of the Sherman Act. When it switched to dealer-operated service stations, Crown could not have its cake and eat it, too. Company-operated stations had not been successful. Attendants were paid salaries and had little incentive to provide fast and efficient service. Thus, the change was made to independent operators, and they were given a direct economic stake in the operation of the station. Yet Crown would not permit independence in the most critical area of all, the setting of the retail price of the gasoline.

A wholesaler like Crown must make a clear-cut choice when deciding whether or not to switch from company-operated to dealer-operated stations. If such a company owns and operates its own stations, it may itself set its retail prices without committing a *per se* violation of the Sherman Act. If it leases stations to independent dealers, it must leave the determination of the retail prices to the unfettered discretion of the dealers. Coercion of any kind is not permitted, whether by written contract or oral threats, because a coerced agreement to fix prices cripples the freedom of traders and thereby restrains their ability to sell in accordance with their own judgment. Kiefer-Stewart Co. v. Jos. E. Seagram & Sons, *supra* at 213, 71 S.Ct. 259. As the Supreme Court said in Simpson v. Union Oil Co., *supra* at 20-21, 84 S.Ct. at 1056:

> Dealers * * * are independent businessmen; and they have all or most of the indicia of entrepreneurs, except for price fixing. The risk of loss of the gasoline is on them, apart from acts of God. Their return is affected by the rise and fall in the market price * * *. Practically the only power they have to be wholly independent businessmen whose service depends on their own initiative and enterprise, is taken from them by the proviso that they must sell their gasoline at prices fixed by [their supplier].

Various devices were used by Crown to achieve its unlawful objectives. At the outset, Crown dealers were openly told when to raise or lower their prices.[12] In the early years of the new program, few dealers questioned the right of their supplier-landlord to dictate their retail prices. But as time went on, there were differences of opinion between dealers and Crown as to the proper price for the dealer to charge to make the most profit. However, Crown was able to coerce compliance with its pricing policies by threats of termination. Its leases in the early years were for one-year terms and could be cancelled on five days' notice. Few were the dealers who would risk cancellation by setting a retail price at variance with Crown's directives.

In March 1972, Crown, was sued in this Court by a dealer named Edward R. Brennan, who claimed an illegal vertical agreement to fix prices in violation of the Sherman Act. Brennan v. Crown Central Petroleum Corporation, Civil

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[12] Indeed, a 1968 memorandum of Crown outlined the conditions and operating procedures for independent dealers, flatly stating that pump postings were to be "at Crown's discretion" and that the understanding as to prices was to be "verbal".

No. 72-264-HM. The suit was settled soon after it was filed, and Crown then abandoned the 5-day cancellation provision and decided merely to "suggest" retail prices to its dealers. However, the "suggestion" was backed up by a big stick. The evidence produced at trial supports the finding of coercive pressure previously made by this Court in granting the preliminary injunction.[13] As this Court previously said (376 F.Supp. at 1256):

> Furthermore, Crown also admits that it gave its dealers "suggested" retail prices to be charged. Faced with short-term leases and having built up good will over a period of years, an independent dealer would not have to be confronted with very much outside pressure to be required to conform to what Crown wanted, rather than setting a price that he might independently think appropriate under existing market conditions. A few words or a veiled threat would be enough to make him toe the line. The facts here indicate the existence of such pressure which would convert a suggested price into a required price. *See* Lehrman v. Gulf Oil Corp., 464 F.2d 26, 37-41 (5th Cir. 1972).

Those dealers who did not go along with the retail price suggested by Crown found that they were suddenly receiving unfavorable inspection reports. A new District Manager named Edward Gillespie was transferred into the Maryland area to put teeth into Crown's policy of maintaining strict control over its dealers and their retail prices.

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[13] In its previous opinion in this case, this Court noted that because of the conflicting affidavits and the lack of an evidentiary hearing, a particularly strong showing had not been made by the plaintiffs of the likelihood of their success at trial. 376 F.Supp. at 1257. After hearing all the testimony at the trial and studying the exhibits, this Court is satisfied that the evidence of illegal vertical price-fixing by Crown is clear and convincing and that plaintiffs have satisfied their burden of proving this antitrust violation.

A former officer in the United States Marine Corps, Gillespie served as the hatchet man for Crown in stamping out the independence that many of its "independent" dealers displayed after the *Brennan* suit.[14]

Dealers who had been the most independent of all, like the plaintiffs, received Gillespie's immediate attention. Plaintiff Phillips had been a dealer since December 1970, and plaintiff Tumminello had been a dealer since March 1968. Both had good performance records. Claiming that they were now unsatisfactory in several particulars, Gillespie offered a "probationary" six-month lease to Phillips in December 1972 and a similar probationary lease to Tumminello in February 1973. Both of these dealers had previously indicated a desire to act independently in setting their own retail prices, and it was Gillespie's intention to bring them into line. Phillips and Tumminello responded by filing suit and were thereafter advised that their leases would be allowed to expire. Also objecting to coercive pressures by Crown, plaintiffs Freitag and Myers filed suit in May 1973. They were likewise told that their leases would not be renewed.[15]

After these action were commenced, Crown tried yet a third approach for fixing its dealers' retail prices. Realizing that short-term leases between a supplier and a dealer are by their very nature coercive,[16] Crown switched to a three-year lease but, at the same time, included new pricing provisions designed to pressure their dealers to conform to the retail prices desired by Crown. Under Paragraph 9 of the new Lease and Dealer Agreement, the wholesale price to be charged a dealer is tied directly to the retail price he charges. If a dealer raises his retail price by one cent a gallon, he is compelled to pay three-quarters of a cent a gallon more as his wholesale price. In addition, Paragraph 6 of the new Lease requires the dealer to sell a specified minimum number of gallons a week. If he does not, Crown may in its absolute discretion terminate the lease after giving the notice required by state law.

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[14] As described by a memorandum in Crown's files dated May 3, 1972, dealers were "feeling their oats" after the *Brennan* matter, and it was necessary for the District Managers to get back the "teeth" they had prior thereto.

[15] As noted previously, plaintiff Myers was offered a new one-year lease, but objected to certain coercive provisions. The terms of renewal were thus never agreed upon.

[16] *See* Phillips v. Crown Central Petroleum Corporation, *supra*, 376 F.Supp. at 1256; F.T.C. v. Texaco, 393 U.S. 223, 226-227, 89 S.Ct. 429, 21 L.Ed.2d 394 (1968); Shell Oil Co. v. F.T.C., 360 F.2d 470, 487 (5th Cir. 1966).

It is not necessary to decide in this case whether every agreement between a supplier-landlord and a dealer-tenant in which the wholesale price paid is directly pegged to the retail price charged amounts to illegal vertical price-fixing. The agreement here included in addition a gallonage clause requiring the sale by the retailer of a specified number of gallons each week for a continuation of the lease. In combination, these provisions are coercive and bring illegal pressure on plaintiffs and other Crown dealers to conform to the retail price desired by Crown.[17]

The provisions in question, added to Crown's standard lease after these suits were filed and after careful discussion with counsel, represent a studied effort to find a means whereby Crown might continue, without offending the antitrust laws, its basic policy of pressuring dealers to fix the retail prices which it deems appropriate. This new approach, like the old, must fail. Innovative devices employed by inventive businessmen to circumvent the Sherman Act must be subjected to close scrutiny. Pearl Brewing Co. v. Anheuser-Busch, Inc., *supra* at 952; Lehrman v. Gulf Oil Corp., 464 F.2d 26, 37 (5th Cir. 1972). The overall effect here of these provisions of the new Lease is as repressive as other coercive measures employed by Crown. Any rise in the retail price automatically increases a dealer's wholesale price, thus restricting the dealer's margin of profit.[18] Furthermore, any such increase in the retail price might be expected to have the short-term effect of decreasing weekly gallonage figures, subjecting the dealer to the risk of immediate notice of cancellation. Dealers who sign the new Lease are hardly free to sell in accordance with their own unfettered judgment. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, *supra* 340 U.S. at 213, 71 S.Ct. 259. By the use of the provisions in question, Crown is employing "other means which effect adherence" to its policy of setting retail prices for its dealers. United States v. Parke Davis & Co., *supra* 362 U.S. at 44, 80 S.Ct. 503.

That Crown has been firmly committed to a policy of fixing the prices of its dealers is shown by events which occurred even after these suits were filed. The evidence indicates that as late as August 1973, District Manager Gillespie pressured dealers Horner and O'Hara to conform to Crown's "suggested" retail prices. Such persistent conduct further indicates Crown's continuing desire, even after such right was challenged in this Court, to control its dealers' retail prices because of the basic importance of such prices to its financial planning and other business decisions.

The evidence also shows that Crown fixed the retail sales price of motor oils sold by its dealers. As discussed hereinafter, Crown required its dealers to sell only Crown motor oil instead of competitive brands. It sought to achieve uniformity in the prices at which its dealers sold its motor oil and in the latter part of 1972 prepared perma-

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[17] Because of federal price controls, Paragraph 9(b) of the new Lease has not been operative. However, the necessary effect of Paragraphs 6 and 9 together is to illegally fix resale prices.

[18] In Lehrman v. Gulf Oil Corp., *supra* at 40, the Fifth Circuit observed that a wholesaler has no more right to dictate to a retailer an appropriate margin of profit on retail sales than to set his retail prices outright.

nent signs for display by dealers showing the prices which dealers should charge for each grade of motor oil. In 1973, a Crown sales representative threatened plaintiff Tumminello with loss of his lease if he did not conform to Crown's pricing policy for motor oils. Other plaintiffs were told that dealers were required to post uniform motor oil prices. On the record here, this Court concludes that Crown has illegally fixed motor oil resale prices of plaintiffs as well as their gasoline resale prices.

(c) *Tying Arrangements*

A tying agreement has been defined as an agreement by a party to sell one product but only on the condition that the buyer also purchase a different product, or at least agree that he will not purchase that product from any other supplier. Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); Osborn v. Sinclair Refining Company, 286 F.2d 832, 838 (4th Cir. 1960). The law has been violated if a defendant compels his customers when they seek to buy the desired (or tying) product to purchase a quantity of another (or tied) product. Osborn v. Sinclair Refining Company, *supra* at 838.

A tying arrangement is illegal *per se* whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 499, 89 S. Ct. 1252, 22 L.Ed.2d 495 (1969); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 65 (4th Cir. 1969). Even if a plaintiff cannot prove that a tying arrangement is *per se* illegal, he may still prevail on the merits whenever he can prove "on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act

have been violated." Fortner Enterprises, Inc. v. United States Steel Corp., *supra* at 500, 89 S.Ct. at 1257.

In this case, plaintiffs claim that Crown has illegally required them to sell Crown motor oil instead of competitive brands and that such a tying agreement is *per se* illegal. However, plaintiffs are not claiming here that Crown's restrictions concerning the sale of antifreeze and vending machine products are likewise *per se* illegal. Recognizing that Crown receives no profit nor other direct monetary enrichment with respect to these other restraints and that the sales of such products are merely incidental to Crown's primary business purpose, plaintiffs instead contend that these tying arrangements are unreasonable restraints of trade under general principles applicable to the Sherman Act.[19]

Taking up first plaintiffs' claim concerning motor oil, this Court is satisfied from the evidence that Crown dealers have been required to sell only Crown motor oil at their stations and have not been permitted to sell any competitive brand such as Quaker State motor oil, even though the quality of such other brand may be undeniably high. Thus, the proof shows that Crown has tied the sale of a secondary product, motor oil, to the sale of the principal product, gasoline, under arrangements it has made with its dealers.

Little question exists in this case concerning the economic power which Crown exerts as to buyers (i. e. its dealers) in the applicable market. An appreciable restraint of free competition results whenever the seller can exert some power over some of the buyers in the market, even if the seller's power is not complete over them and over all other buyers in the market. Fortner Enterprises, Inc. v.

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[19] There is no support in the record for plaintiffs' suggestion that Crown did profit directly when Select Vending Company purchased Crown's stock of vending machines.

United States Steel Corp., *supra* at 503, 89 S.Ct. 1252. Here Crown has the power to impose restrictions concerning motor oil with respect to all of its dealers in the Baltimore metropolitan area, totaling some thirty. Crown thus has more than sufficient economic power with respect to gasoline to appreciably restrain competition in the market for motor oil.

Insofar as the "not insubstantial amount of commerce" requirement for *per se* illegality is concerned, the controlling consideration is whether the total amount of business foreclosed to competitors by the tie is substantial enough in terms of dollar volume so as not to be merely *de minimis*. *Fortner, supra* at 501. For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff or plaintiffs who bring suit. *Fortner, supra* at 502, 89 S.Ct. 1252; Advance Business Systems & Supply Co. v. SCM Corp., *supra* at 63. In denying the petition for rehearing in the *Osborn* case, the Fourth Circuit noted that what the Supreme Court sought to point out in the *Northern Pacific* case was simply that a *de minimis* restraint on competition would not constitute an unlawful tie-in. 286 F.2d at 841. As some of the decisions since *Fortner* have stated this principle, any amount of commerce restrained by an illegal tie-in agreement constitutes a not insubstantial amount of interstate commerce. Falls Church Bratwursthaus, Inc. v. Bratwursthaus Management Corp., 354 F.Supp. 1237, 1240 (E.D.Va.1973).

The evidence here discloses no restraint on commerce which could qualify as a *de minimis* one. Even if the inquiry is confined only to sales of motor oil at Crown stations in the Baltimore metropolitan area, the amounts are not insubstantial. The evidence discloses that in the Baltimore

metropolitan area alone, sales of Crown motor oil are approximately 120,000 gallons annually.[20]

In Osborn v. Sinclair Refining Company, *supra,* a service station dealer challenged restrictions imposed by his supplier-landlord which required the dealer to purchase Goodyear tires, batteries and accessories. Sinclair, the supplier, received a commission from Goodyear for the purchases made by its dealers. The Fourth Circuit found such a tying agreement to be illegal *per se*. For similar reasons, this Court concludes that the facts here disclose a motor oil tying agreement between Crown and each plaintiff amounting to a *per se* violation of the Sherman Act.

The sale of Prestone and Xerex antifreeze and the sale of cigarettes, candy and soda through vending machines now supplied by Select Vending Company raise quite different questions. These products, like the sale of Crown motor oil, are clearly tied products. A dealer who enters into a lease with Crown is restricted to the sale of Prestone and Xerex antifreeze and to the sale of these other vending machine products. But unlike the sale of Crown motor oil, Crown derives no profit or direct monetary gain from the sale of any of these products and these items are not directly related to Crown's principal business purpose of producing and selling petroleum products. A tying arrangement which serves a legitimate business purpose is valid. Fortner Enterprises, Inc. v. United States Steel Corp., *supra* at 506, 89 S.Ct. 1252. However, once the existence of a tie-in is shown, the defendant has the burden of showing a legitimate business reason for imposing the condition. Advance Business Systems & Supply Co. v. SCM Corporation, *supra* at 68, n. 12.

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[20] The testimony of Crown's Vice President Loving discloses that Crown annually sold approximately 60 million gallons of gasoline in the Baltimore metropolitan area and that Crown's sales of motor oil are approximately two-tenths of one percent of its sales of gasoline.

In Miller Motors, Inc. v. Ford Motor Co., 252 F.2d 441 (4th Cir. 1958), the Fourth Circuit upheld the validity of a tying arrangement whereby Ford Motor Company required its dealers to contribute a certain amount per car to a non-profit corporation organized for Lincoln-Mercury dealer advertising. In finding no violation of the Sherman Act, the Court attached significance, *inter alia,* to the fact that the restraint imposed was only an incidental one as the recognized purpose and effect of advertising was to increase trade and not restrain it, and to the fact that the defendant had no financial interest in the advertising agency. 252 F.2d at 446. A similar result was reached in Nelligan v. Ford Motor Company, 262 F.2d 556, 558 (4th Cir. 1959), in which the Court noted, among other pertinent facts, that the restriction had an important bearing on the good will of the defendant and its line of cars and that the defendant had no financial interest in the tied product. *See* David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc., 504 F.2d 52, 58 (4th Cir. 1974).

In Crawford Transport Co. v. Chrysler Corp., 338 F.2d 934 (6th Cir. 1964), cert. den. 380 U.S. 954, 85 S.Ct. 1088, 13 L.Ed.2d 971 (1965), the Court upheld a tying arrangement whereby Chrysler required its dealers to use certain carriers selected by it for the transportation of motor vehicles purchased by the dealer for re-sale. The Court emphasized that Chrysler had no financial interest in any of the transportation carriers it selected and received no direct profits from the performance by them of transportation services. 338 F.2d at 939. *See,* Mid-America ICEE, Inc. v. John E. Mitchell Co., 1973 Trade Cases, ¶ 74,681 at p. 94,990 (D.Ore. 1973).

Crown's multipump marketing concept is based on the sale of gasoline and motor oil at discount prices in modern, well-lighted, clean and uncluttered service stations featuring fast, efficient service by neatly-groomed attendants. No mechanical or other maintenance work is done, and no sales

of general automotive products are permitted. Whereas sales of gas and motor oil are primary objectives, antifreeze is sold merely as an incidental accommodation to customers who ask for it. Sales of cigarettes, candy and soda through vending machines are likewise merely incidental to the primary purpose of the Crown stations.[21]

The tie-ins which exist as to these non-petroleum products are similar to other restrictions in Crown's new Lease and Dealer Agreement, all of which are designed to enhance Crown's image and lead to the sale of larger quantities of petroleum products. Lessees are restricted in the automotive services they may render at their stations. They may not perform automotive repairs, change motor oil, do lubrication work, drain cooling systems, wash cars or undertake other general automotive services. Lessees may not sell tires, batteries or any other products except as authorized by Crown.[22] Lessees must also conform to many Crown requirements as to displays, lighting, uniforms and many other details. The restrictions imposed by Crown concerning the sale of antifreeze and the other incidental products in question are no more unreasonable than the many other restrictions set forth in Crown's Lease and Dealer Agreement. All of these restrictions are designed for the legitimate purpose of promoting Crown's image and fostering its discount marketing concept.

The antitrust laws do not require that a dealer-lessee must be permitted to act independently of his supplier-landlord insofar as all of his activities are concerned. As Judge

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[21] The cigarette tie-in, which resulted in sales of cigarettes at discount prices, was specifically designed to attract customers who would then be sold gas and oil.

[22] No claim has been made here by plaintiffs that any of these other restrictions violate the antitrust laws. It should be noted that these other restrictions are total prohibitions of the sale of other products, while those attacked here merely limit the products which may sold.

Haynsworth recognized in his dissent in Osborn v. Sinclair Refining Company, 324 F.2d 566, 579 (4th Cir. 1963), a supplier who is the owner of the premises where the retail business is conducted may impose reasonable restrictions designed to make the property an effective retail outlet for the sale of the supplier's products.[23] Quite clearly, a dealer must be free to act independently insofar as pricing policies are concerned, and a supplier-landlord may not require that its motor oil be sold as well as its gasoline and may not tie-in other products which unreasonably restrain trade. But it is entirely reasonable for Crown to require that its lessees sell only top quality antifreeze and that vending machine products sold at Crown service stations be of similar good quality or be otherwise designed to promote sales. Garishly-painted vending machines and cheap antifreeze would detract from the image which Crown seeks to project. The restrictions challenged are thus reasonably designed to preserve good will and to further Crown's legitimate business interests. *See* Advance Business Systems & Supply Co. v. SCM Corporation, *supra* at 68, n. 11.

Were this Court to hold that restrictions such as these are unreasonable restraints of trade under the circumstances of this case, the Court would necessarily also be compelled to hold that restrictions prohibiting the sale by Crown dealers of tires, batteries and accessories and prohibiting the rendering of general automotive services are likewise unlawful. The effect of such a ruling would deny Crown the right to engage in its multipump, discount business through dealer-lessees in the manner in which it has operated in the past. If all these restrictions are unlawful, a dealer who signed a Crown lease would be permitted to sell what he wished and perform whatever automotive services he desired, even though operating a station on Crown's property and selling its gasoline. The antitrust laws compel no such result under the circumstances here.

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[23] The point was not disputed in the majority opinion.

From a thorough examination of the purposes and effects of the practices involved, this Court concludes that Crown has shown a legitimate business purpose for the tie-in arrangements with its dealers whereby they are required to sell the antifreeze and vending machine products in question. These tying arrangements therefore do not unduly or unreasonably restrain trade under the Sherman Act. Miller Motors, Inc. v. Ford Motor Co., *supra;* Nelligan v. Ford Motor Co., *supra*; Crawford Transport Co. v. Chrysler Corp., *supra.*

(d) *Plaintiffs' Injuries*

To prevail in this case, plaintiffs have, under § 4 of the Clayton Act, the burden of proving that Crown's violations of the antitrust laws caused injury to their "business or property". 15 U.S.C. § 15. The plaintiffs' burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by proof of *some* damage flowing from each antitrust violation, and inquiry beyond this minimum point goes only to the amount and not the fact of damage. Zenith Radio Corp. v. Hazeltine Research Corp., 395 U.S. 100, 114, n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); Advance Business Systems & Supply Co. v. SCM Corporation, *supra* at 63. It is enough that the illegality is shown to be a material cause of the injury, and a plaintiff thus need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4. Zenith Radio Corp. v. Hazeltine Research Corp., *supra* at 114, 89 S.Ct. 1562; Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 702, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). On the record in this case, plaintiffs have met their burden of establishing a direct causal connection between the antitrust violations that have been found and injuries suffered by them.[24]

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[24] The amount of damages will be determined in later proceedings.

Had Crown not engaged in horizontal price-fixing with its competitors, the retail market in the Baltimore metropolitan area would not have been artificially stabilized. Increased competition would undoubtedly have led to lower retail prices and in turn to lower wholesale prices charged by Crown to plaintiffs. As buyers, the plaintiffs are entitled to damages if defendant as the seller charged them an illegal price, even though they may have passed on the overcharge to their customers. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 483-494, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968).

Plaintiffs also suffered injury when they were prohibited from raising their retail prices by Crown's illegal vertical agreements. Their property was diminished by their inability to raise prices when they chose to do so, and each plaintiff thus suffered injury. Indeed, the fact that an illegal price-fixing agreement existed over a period of time may itself be proof of damage. *See* Fox West Coast Theatres Corp. v. Paradise Theatre Building Corp., 264 F.2d 602, 608 (9th Cir. 1958).

For like reasons, each plaintiff suffered injury when Crown fixed the resale price of motor oils sold at his station and when Crown prohibited the sale of other motor oils. Each plaintiff was prevented by Crown's illegal tying agreement as to motor oil from selecting for sale another high-quality motor oil which might have greater market acceptance than Crown's product. The amount of the damages to be awarded because of this illegal tie-in must await proof of lost sales. Advance Business Systems & Supply Co. v. SCM Corporation, *supra* at 69-70.

Equally clear is that the lease of each plaintiff was not renewed because each plaintiff refused to comply with illegal coercive pressures of Crown. Obviously, non-renewal of his lease would cause substantial direct harm to each plaintiff's business and property. Plaintiffs Tumminello, Freitag and Phillips were not renewed because of their insistence that they determine their own retail prices of gasoline and because they otherwise objected to illegal restrictions imposed by Crown. Plaintiff Myers was not renewed because he objected to provisions in Crown's new Lease and Dealer Agreement which this Court has now held to be illegal.

Crown's contention that all four of the plaintiffs were not renewed because they were unsatisfactory dealers is not supported by the evidence. Until they began to assert their independence, the plaintiffs were known to be good dealers, as they had been able to maintain their sales at continuing high levels.[25] When they began to object to Crown's illegal practices, plaintiffs suddenly began to receive unsatisfactory inspection reports. The evidence shows that the enforcement of Crown's operating standards through the use of inspection reports was uneven. On occasion, District Manager Gillespie himself changed ratings made by station supervisors from "good" to "unacceptable". The deficiencies relied upon by Crown were either contrived by its representatives to serve the Company's coercive ends or were minor in nature. The fact that some of these minor deficiencies might have contributed to Crown's decision not to renew the plaintiffs' leases would not defeat plaintiffs' claims here, since Crown's illegal motive substantially contributed to such decision. Osborn v. Sinclair Refining Company, 286 F.2d at 837.

CONCLUSIONS OF LAW

1. Defendant Crown has violated Section 1 of the Sherman Act by combining with competitors horizontally in the

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[25] Indeed, Myers was recognized by Crown as a satisfactory dealer as late as May 1973, when he was offered a new one-year Lease. Only after he complained about coercive pricing provisions in the new Lease did Crown suddenly conclude that he was unsatisfactory.

fixing of the retail prices of gasoline in the Baltimore metropolitan area.

2. Defendant Crown has violated Section 1 of the Sherman Act by entering into illegal vertical agreements with plaintiffs fixing the retail prices of gasoline in the Baltimore metropolitan area.

3. Defendant Crown has violated Section 1 of the Sherman Act by entering into illegal tying agreements with plaintiffs relating to the sale of Crown motor oils in the Baltimore metropolitan area.

4. Defendant Crown has not violated Section 1 of the Sherman Act by restricting plaintiffs in the sale of antifreeze and in the sale of cigarettes, candy and soda through vending machines.

5. Plaintiffs have suffered damage pursuant to Section 4 of the Clayton Act as a result of Crown's horizontal price-fixing, vertical price-fixing and illegal tying agreements as to motor oil.

RELIEF

For the reasons stated, each plaintiff is entitled to an injunction which would require the renewal of his lease under Crown's new Lease and Dealer Agreement as modified pursuant to this Opinion. Plaintiffs are also entitled to damages, attorneys' fees and costs as determined after further proceedings. Counsel should submit an appropriate Order, prepared in accordance with the findings and conclusions contained herein.

APPENDIX D

United States District Court,
D. Maryland

Civ. Nos. 73-303-H, 73-304-H, 73-504-H and 73-506-H.

John T. Phillips, Jr., *Plaintiff*,
v.
Crown Central Petroleum Corporation, *Defendant*.

Corrado Frank Tumminello, *Plaintiff*,
v.
Crown Central Petroleum Corporation, *Defendant*.

Charles Phillip Freitag, *Plaintiff*,
v.
Crown Central Petroleum Corporation, *Defendant*.

Carroll Charles Myers, *Plaintiff*,
v.
Crown Central Petroleum Corporation, *Defendant*.

Feb. 17, 1977.

Alexander Harvey, II, *District Judge:*

Four independent gasoline service station dealers have brought these consolidated cases against their supplier-landlord, Crown Central Petroleum Corporation, seeking treble damages, attorneys' fees, injunctive relief and costs under the antitrust laws. Following a four-week non-jury trial, this Court filed a written Opinion, *Phillips v. Crown Central Petroleum Corp.*, 395 F.Supp. 735 (D.Md.1975) (*Phillips II*),[1] finding in favor of the plaintiffs as to most of the liability issues presented. In accordance with the findings and conclusions set forth in that Opinion, an Order was entered on July 1, 1975, providing that Crown has violated Section 1 of the Sherman Act, 15 U.S.C. § 1, in the following respects:

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[1] In an earlier Opinion, *Phillips* v. *Crown Central Petroleum Corp.*, 376 F.Supp. 1250 (D.Md. 1973) (*Phillips I*), this Court

> "1. Defendant Crown Central Petroleum Corporation has violated Section 1 of the Sherman Act by combining with competitors horizontally in the fixing of the retail prices of gasoline in the Baltimore metropolitan area.
>
> "2. Defendant Crown Central Petroleum Corporation has violated Section 1 of the Sherman Act by entering into illegal vertical agreements with plaintiffs fixing the retail prices of gasoline in the Baltimore metropolitan area.
>
> "3. Defendant Crown Central Petroleum Corporation has violated Section 1 of the Sherman Act by entering into illegal vertical agreements with plaintiffs fixing the retail prices of motor oil in the Baltimore metropolitan area.
>
> "4. Defendant Crown Central Petroleum Corporation has violated Section 1 of the Sherman Act by entering into illegal tying agreements with plaintiffs relating to the sale of Crown motor oils in the Baltimore metropolitan area."

The Order further provided that each plaintiff was entitled to treble damages, attorneys' fees and costs, all to be determined after further proceedings. With the agreement

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granted plaintiffs' motion for a preliminary injunction. As a result of the preliminary injunction entered at that time and the permanent injunction entered later, the plaintiffs have remained as Crown service station operators, except for plaintiff Tumminello who vacated his station shortly after this Court ruled on February 17, 1976 that the injunction would not be continued as to him.

of the parties, the Court had ordered a bifurcated trial, with all issues of liability being tried first and all issues of remedy reserved for later proceedings.

Following further proceedings in October 1975, this Court made certain rulings as to the scope of the permanent injunction to be entered, and an Order giving effect to such rulings was entered on December 15, 1975.[2] Thus, the questions which remain to be decided relate to the amounts of damages, attorneys' fees and costs to which the successful plaintiffs are entitled.

Following further discovery by the parties, the issue of damages recoverable under Section 4 of the Clayton Act, 15 U.S.C. § 15, came on for trial before this Court on June 21, 1976. Thereafter, plaintiffs filed an application for the allowance of attorneys' fees and a proposed bill of costs. Following the evidentiary hearing on damages, the parties filed exhaustive post-trial briefs on all questions presently before the Court, and final argument was heard in open court on October 19, 1976.

I

Damages

In *Phillips II, supra,* this Court found that Crown has violated Section 1 of the Sherman Act (1) by combining with competitors horizontally in the fixing of the retail prices of gasoline in the Baltimore metropolitan area; (2) by entering into vertical agreements fixing the retail prices of gasoline in the same market area; and (3) by entering into vertical and tying agreements relating to the sale of

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[2] For reasons not relevant here, the Court subsequently modified that Order as to plaintiff Tumminello. Defendant has, since the liability trial, filed numerous post-trial motions seeking relief in various forms, the most recent of which has been denied in a Memorandum and Order filed this same date.

Crown motor oils in the same market area. 395 F.Supp. at 757-59, 760-64, 764-66.[3] The Court further determined that these illegal marketing practices caused injury to each plaintiff's "business or property" within the meaning of Section 4 of the Clayton Act. On the basis of the evidence produced, the Court concluded that "plaintiffs have met their burden of establishing a direct causal connection between [Crown's] antitrust violations . . . and injuries suffered by them." *Id.* at 768 (footnote omitted).

The parties have stipulated to the amount of damages which this Court should award each plaintiff because of illegal restraints relating to the sale of Crown motor oils.[4] However, the parties vigorously dispute both the existence of and the amount of any damages recoverable by plaintiffs as a result of both the horizontal and the vertical violations pertaining to the sale of gasoline. Plaintiffs claim that they are entitled to single damages in the amounts of $38,579 for Phillips, $49,156 for Tumminello, $30,335 for Freitag and $54,561 for Myers. Plaintiffs further ask that these amounts be trebled under Section 4 of the Clayton Act. Crown objects to awards in these amounts, contending that they are no more than speculative estimates which are without foundation on the record here. In addition, Crown asserts that under the so-called "pass-on" defense, the plaintiffs actually suffered no injury and are therefore not entitled to any award at all.

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[3] The Court also found that Crown had unlawfully refused to renew the service station lease of each plaintiff because of his opposition to the above illegal practices. 395 F.Supp. at 768-69. The equitable relief awarded each plaintiff has remedied this particular wrong.

[4] The amount stipulated is $250 for each plaintiff as single damages. This stipulation has been made "without prejudice to Crown's right to contest the Court's finding of liability on these issues, and without defendant admitting that any monetary damage was incurred by plaintiff."

Plaintiffs' claims for damages rest essentially upon the expert testimony of Dr. Carl F. Christ, a Professor of Economics at the Johns Hopkins University. Using the price and gallonage statistics provided by Crown,[5] Dr. Christ has calculated separately the horizontal and vertical damages of each plaintiff. These damages have been measured from the time the particular plaintiff became a Crown dealer until April 3, 1973, when the first complaint in these consolidated cases was filed in this Court. Dr. Christ made no adjustment in the period for those plaintiffs who filed suit after April 3, 1973, but simply assumed that Crown then relinquished its control over retail gasoline prices. Crown has not questioned the correctness of the period used by Dr. Christ in his calculations, and the Court will accept this period for the purpose of determining the amount to be awarded to each plaintiff both as vertical and as horizontal damages.

(a) *The Vertical Damages Claimed*

As this Court found in ***Phillips II, supra*** at 768, plaintiffs "suffered injury when they were prohibited from raising their retail prices by Crown's illegal vertical agreements." Dr. Christ affixes a monetary value to this injury through a comparison of the actual gross margin, that is the retail price less the wholesale price,[6] for each plaintiff after these suits were filed and the theoretical gross margin for each plaintiff had Crown continued to maintain its vertical restraints on the retail price of gasoline for the period in question. The actual gross margin has been determined from the known wholesale prices paid by and the retail prices charged by plaintiffs for regular and premium gasoline during the six-month period from April 3 to

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[5] The parties have stipulated to the correctness of these figures.

[6] In this Opinion, the Court will adopt Dr. Christ's definition of "gross margin" as meaning retail price less wholesale price.

September 30, 1973, inclusive. The evidence shows that each plaintiff's gross margin increased markedly and abruptly in April of 1973 after Crown permitted the plaintiffs to set their own retail prices. For the same six-month period, Dr. Christ then computes the daily theoretical gross margin for each plaintiff, based on Crown's own formula for setting retail prices.[7] By subtracting the theoretical from the actual gross margin for each day, Dr. Christ obtains the increase in gross margin attributable to the cessation of Crown's vertical price-fixing. Every increase is then weighted by the number of days it existed and averaged over the entire six-month period. In this manner, Dr. Christ arrives at an average gross margin increase for each plaintiff from April through September of 1973.[8] Since plaintiffs set their own retail gasoline prices during that period, Dr. Christ concludes that this average increase is an approximate measure of the amount by which margins prior to April 3, 1973 were held down through vertical price-fixing by Crown.

Using this average gross margin increase, Dr. Christ then calculates the total monetary damages sustained by each plaintiff as a result of Crown's illegal vertical agreements. This is done by multiplying each plaintiff's own increase by the amount of gasoline he would have purchased and sold in the absence of price-fixing. This latter figure is determined from the number of gallons purchased by that plaintiff since becoming a Crown dealer but before April 3, 1973. Because Crown's retail price-fixing efforts undoubtedly impeded plaintiffs' actual sales in this period.[9] Dr. Christ indicates that these gallonage figures are probably lower than what plaintiffs would otherwise have sold in a free market. He therefore asserts that, if anything, he has understated the amounts in concluding that the plaintiffs have suffered damages for vertical price-fixing as follows: Phillips, $8,050; Tumminello, $15,274; Freitag, $8,132; and Myers, $9,650.

(b) *The Horizontal Damages Claimed*

Although this Court has concluded that Crown conspired with its competitors horizontally to fix the *retail* prices of gasoline, the resulting injury to the plaintiffs arises because of the *wholesale* prices charged by Crown. Such is the necessary result of Crown's method of pricing its gasoline. Because Crown first decided on the appropriate retail price to be charged for its gasoline by the dealers and then worked back to the wholesale price to be charged the dealer, *Phillips II, supra* at 758, any artificially high *retail* price necessarily increased the *wholesale* price above the competitive level. *Id.* at 768. Thus, in *Phillips II, supra* at 768, this Court concluded that "[a]s buyers, the plaintiffs are entitled to damages if [Crown] as the seller charged them an illegal price" in furtherance of the horizontal conspiracy to fix the retail price of gasoline.

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[7] In *Phillips II, supra* at 746-47, this Court found that it was Crown's practice to allow its dealers a ¼ cent increase in gross margin for each ¾ cent increase in the wholesale price of gasoline. Thus, a ¾ cent increase by Crown in the wholesale price would produce a 1 cent increase in the retail or pump price.

[8] This approach produced a much higher average gross margin increase for Myers and a much lower one for Phillips than for the other two plaintiffs. Attributing these results to certain unique market conditions, Dr. Christ did not use the Myers and Phillips figures but rather employed the average of the increases experienced by Tumminello and Freitag as a measure for Myers and Phillips as well. Crown has not and cannot, complained of this approach, for its net effect is to reduce the total amount of damages sought by plaintiffs. Had Dr. Christ used in his computations the actual average gross margin increases for Myers and Phillips, the combined damages for these two plaintiffs would have been much higher./

[9] Dr. Christ convincingly shows that, freed from Crown's illegal restraints, the retail prices of gasoline would have been lower, thereby prompting greater sales. Dr. Christ reaches this conclusion by comparing the average gross margin increases after April 3, 1973 with the average differentials between the retail prices required by Crown to be charged by plaintiffs and what he has identified as the competitive retail price level. Since the average increases are less than these differentials, Dr. Christ concludes that plaintiffs, on their own, would have posted lower retail prices during the damage period. He further explains that this would have been possible because the wholesale prices charged by Crown would have been considerably lower with the absence of the horizontal conspiracy.

Dr. Christ computes the horizontal damages suffered by the plaintiffs as the difference between the wholesale price Crown charged each plaintiff and the competitive wholesale price it charged other dealers in the Baltimore area. He measures this overcharge by means of an average wholesale price differential for the period from November 24, 1970 through April 3, 1973, when this litigation began.[10] As computed by Dr. Christ, this average differential shows how much each plaintiff paid per gallon for gasoline above what the wholesale price would have been without the horizontal conspiracy. To determine the average wholesale price differential, Dr. Christ again relies upon the fixed relationship between Crown's wholesale and retail prices. For the above-mentioned period, he first ascertains each plaintiff's weighted average retail price differential by comparing plaintiffs' actual retail prices with what he believes to have been the competitive ones.[11] Using a factor of ¾ to account for Crown's pricing formula, Dr. Christ then converts this retail price differential into the average wholesale price differential for each plaintiff. By next multiplying this latter figure by the number of gallons of gasoline purchased by the particular plaintiff during the damage period, Dr. Christ calculates damages for horizontal price-fixing to be as follows: Phillips, $30,529; Tumminello, $33,882; Freitag, $22,203; and Myers, $44,911.

Central to Dr. Christ's appraisal of plaintiffs' horizontal damages is his determination of competitive retail prices in the Baltimore market area. To make such a determination, Dr. Christ has relied upon the findings made by this Court in *Phillips II,* and in particular on Findings of Fact Nos. 14, 18, 29, 32 and 39. In essence, this Court therein found that the purpose of the horizontal conspiracy was to eliminate retail price disturbances among independent dealers in the Baltimore metropolitan area, thus artificially raising the price of gasoline charged and avoiding any retaliatory pricing by the major oil companies. 395 F.Supp. at 742-43, 745-46, 747. In view of these findings, Dr. Christ concludes that the lowest retail price in the Baltimore area for Crown gasoline would represent a reasonable estimate of what the competitive retail price would have been in the absence of the horizontal conspiracy.

Support for this conclusion is derived from Finding of Fact No. 19, in which this Court found that in 1971 Crown was not able to stabilize the retail price in the area around York and Padonia Roads in Timonium, Maryland, where its service station P-57 is located. 395 F.Supp. at 743. If the lowest retail price charged by a Crown dealer is accepted as the competitive retail price absent a horizontal conspiracy, Dr. Christ concludes that the retail prices charged at station P-57, where the horizontal conspiracy failed, would be the lowest, or among the lowest, of all of Crown's Baltimore dealers. Indeed, Crown's own records of the retail prices charged by its dealers throughout the Baltimore area from November 24, 1970 to April 3, 1973 further support this conclusion. These records show that, for some twelve months of this period, station P-57 posted the lowest retail prices in the entire area.[12] Crown's records further indicate that, although not always the only service station posting the lowest retail prices, station P-57 most consistently charged the lowest price. While acknowledging that peculiar market conditions might in part have influenced the pricing at station P-57, Dr. Christ convincingly asserts that the better explanation for such consistently low prices would be the nonexistence of an effective horizontal price-fixing agreement for this area. Based on these facts as to station P-57, Dr. Christ concludes that the lowest retail price of Crown gasoline in the Baltimore area would be the competitive retail price which would have prevailed in such area had there been no horizontal conspiracy.

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[10] Although two plaintiffs became Crown dealers before November 24, 1970, Dr. Christ testified that he computed the average wholesale price differentials from that time because Crown's statistical data began with that date. Crown has not objected to this starting point. However, Phillips did not become an independent Crown dealer until January 25, 1971. In making his damage calculations, Dr. Christ has appropriately adjusted the damage period for this plaintiff.

[11] Like the average gross margin increase used in computing vertical damages, the average retail price differential has been weighted by the number of days for each particular amount that plaintiffs' prices exceeded the competitive level.

Furthermore, Dr. Christ asserts that, if anything, his determination of horizontal damages, like that of vertical damages, understates plaintiffs' actual injury. By using the lowest retail price of Crown gasoline as the starting point for computing plaintiffs' horizontal damages, Dr. Christ has assessed no damages during those periods when Crown was completely successful in stabilizing retail prices throughout the Baltimore area. Under such circumstances and during those times, plaintiffs' retail, and thus wholesale, prices were the same as those of the lowest priced Crown dealer. Thus, even though plaintiffs were then charged an illegal wholesale price, Dr. Christ's calculations do not include any increment for the injury suffered during that period. Dr. Christ thereby concludes that his approach is a conservative one which gives Crown the benefit of any doubt.

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[12] It is significant that this station's prices dropped in August of 1971, after Crown's unsuccessful attempt that year to fix retail prices in the York and Padonia Roads area.

(c) *Defendant's Contentions*

Asserting that the plaintiffs are entitled to no damages at all on the record here, Crown attacks these calculations of horizontal and vertical damages for each plaintiff in several different ways. First, Crown offers alternative, competitive explanations for the pricing phenomena which underly Dr. Christ's calculations and contends that the damages suggested by Dr. Christ lack any satisfactory degree of accuracy. In particular, Crown complains that Dr. Christ has failed to account for numerous changes and aberrations in the conditions of the market area. Secondly, Crown points out that this Court found only unlawful price-fixing of retail prices of gasoline, *see Phillips II, supra* at 757 n. 7, and Crown argues that, by separately claiming both horizontal and vertical damages, plaintiffs seek a double recovery. Crown concedes that the two theories utilized by Dr. Christ (the "before and after" theory for vertical damages and the "yardstick" theory for horizontal damages) are acceptable means of measuring antitrust damages, but argues that, in combination, these theories compensate the plaintiffs twice for the same injury. Finally, with regard to plaintiffs' claim for horizontal damages, Crown relies upon the so-called "pass-on" defense and submits that plaintiffs in fact suffered no injury at all because they passed on any unlawful overcharge to their customers.

In challenging the accuracy of plaintiffs' damage calculations, Crown points to the possible market conditions existing over the comparative control periods used by Dr. Christ. Insofar as the calculation of vertical damages is concerned, Crown focuses its attack upon the significance and amount of any gains in gross margin. Rather than attribute each plaintiff's increase in gross margin to the removal of vertical pricing restraints as Dr. Christ does, Crown explains these increases as the product of a gasoline shortage from April through September of 1973. This shortage, Crown contends, distorts plaintiffs' gross margins, thereby making that period an inappropriate one for comparison.

As an alternative argument, Crown contends that even if this Court accepts the period after the complaint was filed as a proper basis for computing plaintiffs' vertical damages, the control period should extend only until August 24, 1973 when certain Federal Energy Administration price regulations became effective.[13] Under these regulations, Crown was required to reduce its wholesale prices while plaintiffs remained free to set their own retail prices. Although retail prices subsequently came under federal regulation on September 8, 1973 only plaintiff Myers was then posting above the allowed retail level and was thus required to reduce his prices. In light of this disparate effect of federal price controls upon gasoline refiners and dealers, Crown contends that plaintiffs maintained abnormally high gross margins between August 24 and September 30, 1973 and that therefore these margins should not be considered in computing the damages resulting from vertical price-fixing.

Dr. Christ's method for measuring plaintiffs' horizontal damages is likewise attacked by Crown. Specifically, Crown objects to his defining the competitive retail price level for the damage period in terms of the lowest price among all its Baltimore dealers. Low prices, Crown argues, are caused by numerous factors other than competition. As an example, Crown points to a combination of new entrants into the competitive picture and intermittent price wars in the York and Padonia Roads area as in fact causing the low prices at station P-57. Since Dr. Christ made no adjustments for factors such as these, Crown contends that he has not correctly identified the competitive retail price level by simply taking the lowest price prevailing among all Crown dealers.

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[13] These regulations are found in 6 C.F.R. § 150.351 et seq. (1974).

(d) *The Law as Applicable to the Claims and Defenses*

While Crown's contentions are pertinent to the exactness and precision of Dr. Christ's analysis, they do not require this Court to reject his calculations of plaintiffs' damages. In asserting its objections to Dr. Christ's approach, Crown seeks to impose upon plaintiffs the burden of proving damages to a higher degree of certainty than is required for such proof in antitrust litigation. Recognizing that damage issues in such cases "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts," the Supreme Court has cautioned "[t]rial and appellate courts alike . . . [to] observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff . . ." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). These practical limitations have produced

> a clear distinction between the measure of proof necessary to establish the fact that [plaintiff] had sustained some damage, and the measure of proof necessary to enable the [finder of fact] to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, *not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.* (Emphasis added)

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931); *accord, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-66, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Dantzler v. Dictograph Products, Inc.*, 309 F.2d 326, 330 (4th Cir. 1962); *Greene v. General Foods Corp.*, 517 F.2d 635, 660 (5th Cir. 1975), *cert. denied*, 424 U.S. 942, 96 S.Ct. 1409, 47 L.Ed.2d 348 (1976).

Once, as here, the causal connection between the defendant's proven violation of the antitrust laws and a plaintiff's injury has been established, "the plaintiff may enter the more uncertain realm of evaluating the portion of the injury that may be attributed to the defendant's wrongful conduct." *Terrell v. Household Goods Carriers' Bureau,* 494 F.2d 16, 20 (5th Cir.), *cert. dismissed,* 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974). Indeed, in *Terrell,* the Fifth Circuit emphasized that plaintiff's "expert on damages need not be armed on the right hand with a slide rule, on the left hand with a computer. He is allowed some economic imagination so long as it does not become fantasy." *Id.* at 25; *accord, Lehrman v. Gulf Oil Corp.,* 500 F.2d 659, 671 (5th Cir. 1974), *cert. denied,* 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975).

Thus, while damages in an antitrust case "may not be determined by mere speculation or guess," the Supreme Court has repeatedly found that "it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co., supra,* 282 U.S. at 563, 51 S.Ct. at 250; *accord, Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. at 123-24, 89 S.Ct. 1562; *Bigelow v. RKO Radio Pictures, Inc., supra,* 327 U.S. at 264-66, 66 S.Ct. 574. One Court has gone so far as to indicate that this standard even allows for "proof of losses which border on the speculative" where necessary "in order to implement the policy of the antitrust laws." *Ford Motor Co. v. Webster's Auto Sales, Inc.,* 361 F.2d 874, 887 (1st Cir. 1966).[14] An approach to the determination of measure of damages like that of *Zenith Radio Corp.* is particularly appropriate in a case such as this one where the defendant's own disregard for the antitrust laws has "obscured conditions that would have prevailed in a free marketplace and made impossible precise calculation of damages." *Greene v. General Foods Corp., supra* at 663. As the Supreme Court commented many years ago in *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 379, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1927): "[A] defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."

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[14] In view of the evidence produced in this case, it is not necessary to apply such a standard here. Proof of damages furnished by the plaintiffs in this case is not speculative or conjectural.

When examined in the light of these legal standards, Dr. Christ's analysis, with the one exception noted hereinafter, represents a more than adequate assessment of the damages sustained by each plaintiff as a result of Crown's antitrust violations. After consideration of all of Crown's arguments and the record here, this Court concludes that the assumptions made by Dr. Christ are generally sound enough to support "a just and reasonable estimate of the damage based on relevant data." *Bigelow v. RKO Radio Pictures, Inc., supra,* 327 U.S. at 264, 66 S.Ct. at 580; *see Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1206-07 (9th Cir. 1975), *cert. denied* 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976); *Herman Schwabe, Inc. v. United States Shoe Machinery Corp.,* 297 F.2d 906, 911 (2d Cir.), *cert. denied,* 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85 (1962).

With reference to the vertical damages calculated, the evidence here does not show, as contended by Crown, that plaintiff in the April to September 1973 period knowingly acted in such a way as to influence the amount of damages they would recover. At that time, plaintiffs had not as yet been successful in the liability stage of this case, and they were conducting their regular business operations subject to normal competitive considerations. Nor does it appear (except as noted below) that other factors made this period an improper one for use by Dr. Christ in computing vertical damages. Plaintiffs were during this period setting their own retail prices, and their pricing decisions at this time were not affected by Crown's price-fixing activities.

In support of its position, Crown called as an expert witness Dr. Charles L. Trozzo, an officer of Richard J. Barber Associates, Inc.[15] Although objecting to Dr. Christ's approach in calculating damages, Dr. Trozzo conceded in his testimony that his objections had no basis in fact but were simply "thoughts off the top of [my] head, nothing [I] really thought about." Rather than undertaking to support the professed inaccuracy of Dr. Christ's approach by referring to proven facts, Dr. Trozzo has done no more than identify hypothetical competitive factors not considered by his counterpart. For example, Dr. Trozzo made no study of market conditions in order to substantiate his claim that prices at station P-57, used by Dr. Christ in computing horizontal damages, were actually caused by new entrants into the competitive picture and by price wars. Indeed, in his testimony, Dr. Trozzo admitted the uncertainty of his own explanation for the consistently low prices posted at Crown service station number P-57. A conjectural attack of this sort does not, as Crown argues, undermine the reasonableness of Dr. Christ's damage figures. An expert relied upon by a plaintiff in an antitrust case need not exhaust the realm of possibilities for computing damages, "particularly where [the defendant] offers no clearly superior set of assumptions that could have been applied to the available data with more accurate results." *Greene v. General Foods Corp., supra* at 662.

One of Crown's principal attacks on Dr. Christ's analysis is based on the contention that an award of both horizontal and vertical damages would give the plaintiffs a double recovery for the same injury. This Court would disagree. Crown's horizontal and vertical violations of the antitrust laws resulted in separate and distinct injuries suffered by the plaintiffs. Although the retail price of gasoline was the target of both illegal agreements, each violation affected that price in a different manner. The vertical violations directly controlled retail prices while the horizontal conspiracy strengthened that control by means of inflated wholesale prices. As this Court observed in *Phillips II, supra* at 761, the "findings in this case of an illegal horizontal combination between Crown and certain competitors directly complement and support the findings of illegal vertical agreements with dealers."

Thus, plaintiffs as dealers were injured on both the wholesale and retail levels in marketing Crown gasoline. Regardless of the wholesale price charged, Crown illegally interfered with plaintiffs' gross margins by restricting the retail price of gasoline. This injury may be attributed solely to the illegal vertical agreements. Even if there had been no vertical violations and plaintiffs had been able to fix their own retail prices, plaintiffs would still have suffered injury because of the horizontal conspiracy which enabled Crown to charge artificially high wholesale prices. Conversely, absent a horizontal conspiracy, the plaintiffs would still have suffered loss because of the fixing by Crown of their retail prices. Thus, the horizontal and vertical violations resulted in different injuries to plaintiffs' businesses: the former produced an overcharge in wholesale prices while the latter prevented any increase in gross margin at the retail level. As long as the measured increase in gross margin attributable to the removal of vertical pricing restraints does not reflect any wholesale price decrease resulting from the cessation of the horizontal conspiracy (and the evidence here indicates that it does not), there is no double recovery. Accordingly, separate damage assessments for the horizontal and vertical violations are proper.

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[15] That firm does consulting work in connection with corporate mergers and public utility rate-making investigations.

Nor is there any overlap or double counting which results from the methods employed by plaintiffs' expert in computing damages in this case. From Dr. Christ's testimony and the other evidence here, this Court finds that his horizontal and vertical damage calculations, as modified herein, properly reflect each plaintiff's total monetary loss caused by Crown's gasoline price-fixing activities. By employing both the "before and after" and the "yardstick" methods for computing damages, Dr. Christ has not, as Crown argues, compensated plaintiffs twice for the same injury. Not only may these two methods be used in conjunction, *e.g., Bigelow v. RKO Radio Pictures, Inc., supra,* but they may also be "specially tailored to fit" any peculiar circumstances, *Lehrman v. Gulf Oil Corp., supra* at 668. Thus, although the proof offered by plaintiffs in support of their damage claims encompasses elements of both methods but is not a classic example of either one, the use of both methods does not indicate any double counting.

More importantly, in this particular case, Dr. Christ has avoided any overlap by separately computing plaintiffs' horizontal and vertical damages. Since Crown's wholesale prices did not drop after these suits were filed, the average gross margin increases used by Dr. Christ in assessing vertical damages do not embrace any part of the overcharge which forms the basis for the horizontal damages suffered by plaintiffs. The average gross margin increases show only the extent that each plaintiff was able to raise his gross margin by fixing his own retail prices. The amount of any overcharge by Crown in its wholesale prices is then separately accounted for by the horizontal damage figures. In short, the Court finds no double counting in Dr. Christ's computation of plaintiffs' total damages.

Finally, Crown contends that the so-called "pass-on" defense would defeat any recovery by the plaintiffs in this case. A similar argument advanced at the liability stage of these proceedings was rejected by this Court. In *Phillips II,* this Court said the following (395 F.Supp. 768):

> As buyers, the plaintiffs are entitled to damages if defendant as the seller charged them an illegal price, even though they may have passed on the overcharge to their customers. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 483-494, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968).

In challenging this Court's reliance on *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), Crown argues, *inter alia,* that the Supreme Court in that case was addressing the "pass-on" defense in terms of causation of injury and was not there concerned with the amount of damages. The authorities relied upon by Crown do not support such a contention.

Since *Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U.S. 390, 396, 27 S.Ct. 65, 66, 51 L.Ed. 241 (1906), likewise a treble-damage antitrust case, the Supreme Court has recognized that "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property." *See Hawaii v. Standard Oil Co. of California,* 405 U.S. 251, 262-63 n. 14, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). In another early case, *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,* 245 U.S. 531, 533, 38 S.Ct. 186, 62 L.Ed. 451 (1918), Mr. Justice Holmes recognized that the "general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss * * *."

In the *Hanover Shoe* case, the Supreme Court narrowly circumscribed the availability of the "pass-on" defense in antitrust litigation. Although acknowledging "that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where * * * the passing-on defense" would be appropriate, 392 U.S. at 494, 88 S.Ct. at 2232, the Court broadly held as follows:

> We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury *and damage* within the meaning of § 4 [of the Clayton Act.]
>
> If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher . . . We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower. (Emphasis added)

Id. at 489, 88 S.Ct. at 2229.

In the opinion, Mr. Justice White was quite clearly discussing both the fact of the injury and the amount of damages sustained when he ordered that proof of the amount of the overcharge made out a *prima facie* case. In concluding his discussion of the subject, he said the following, at page 494, 88 S.Ct. at page 2232:

> Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing-on defense.

Decisions of the lower federal courts since *Hanover Shoe* recognize that the Supreme Court in that case, although it did not abolish the "pass-on" defense, did strictly limit its applicability to those few situations where plaintiff's lack of injury is readily provable. *Standard Industries, Inc. v. Mobil Oil Corp.*, 475 F.2d 220, 224 (10th Cir. 1973); *Obron v. Union Camp Corp.*, 477 F.2d 542, 543 (6th Cir. 1973); *see West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1088 (2d Cir.), *cert. denied*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 323 F. *Supp.* 381, 385-87 (E.D.Pa.1970). This strict limitation of the "pass-on" defense in antitrust litigation comports with the general rule in regard to damages not go to beyond the first step. *See Southern Pacific Co. v. Darnell-Taezner Lumber Co., supra; accord, In re Western Liquid Asphalt Cases,* 487 F.2d 191, 197 (9th Cir. 1973), *cert. denied,* 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474 (1974).

The facts here quite clearly do not fall within the narrow circumstances mentioned in *Hanover Shoe* when the "pass-on defense" might be applicable. The relationship between Crown's wholesale prices and plaintiffs' retail prices does not readily lend itself to proof that plaintiffs avoided injury by passing any overcharge on to their customers. When plaintiffs reacted to Crown's increases in wholesale prices by raising their retail prices, they were doing no more than insuring that their margin of profit did not decline. To establish the "pass-on" defense, however, there still "remain[s] the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable." *Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra,* 392 U.S. at 493, 88 S.Ct. at 2231. Footnote 9 at page 493, 88 S.Ct. at page 2231 goes on to say:

> The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.

In this case, the defendant has not made the necessary showing and therefore cannot rely on the "pass-on" defense. Quite clearly there was no pre-existing cost-plus contract or other arrangement between the parties which would readily show that the plaintiffs sustained no damage at all as a result of the overcharges.

Crown's reliance on *In Re Western Liquid Asphalt, supra,* and *Obron v. Union Camp Corp., supra,* is misplaced. Those cases involved factual circumstances very much different from the facts here present. In *Western Liquid Asphalt,* the Court was concerned with "pass-on" not as a defense but as a theory of recovery relied upon by plaintiffs at different levels of a chain of distribution. Other cases which have considered this quite different problem have recognized that antitrust claimants who are too remote in the chain of distribution cannot recover from a price-fixing manufacturer. *Mangano v. American Radiator & Standard*

Sanitary Corporation, 50 F.R.D. 13 (E.D.Pa.1970), *aff'd,* 438 F.2d 1187 (3d Cir. 1971); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., supra.*[16] In the *Mangano* case, Judge Lord concluded (and the Third Circuit affirmed his decision) that the *Hanover Shoe* rationale applies not only when a manufacturer defendant asserts a pass-on defense to the claim of an initial purchaser but also to a claimant at the end of a chain of distribution who is faced with precisely the same problems of proof not by way of defense but as a part of its affirmative claim.

Obron v. Union Camp Corp., supra, is inapposite here because it involved an arrangement which more closely approached a sales commission rather than a buyer-seller relationship. And in *Umphres v. Shell Oil Co.,* 1973-2 Trade Cas. ¶ 74,709 (S.D.Tex.1973), *aff'd* 512 F.2d 420 (5th Cir.), *cert. denied,* 423 U.S. 929, 96 S.Ct. 278, 46 L.Ed.2d 257 (1975), the trial court did no more than speculate that the defendant under certain circumstances might be entitled at the trial to assert a pass-on defense.

Hanover Shoe is clearly controlling here. In this case, the plaintiffs were direct purchasers from the price-fixing defendant and are entitled to recover damages measured by the amount of the overcharge, whether or not the possibility may have existed that they may have passed on the overcharge to their customers. *Hanover Shoe, supra,* 392 U.S. at 483-94, 88 S.Ct. 2224.

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[16] Crown has also suggested that it may be subjected to multiple recoveries because they are presently pending various actions filed by consumers in which Crown has been named as a defendant. But *Mangano* and similar cases indicate that remote purchasers are not always entitled to recover from a price-fixing manufacturer. In any event, *Hanover Shoe* recognizes the right of an immediate purchaser from the defendant, like each plaintiff here, to recover no matter what the result may be as to more remote claimants.

Although this Court has rejected Crown's arguments seeking to defeat the recovery of vertical or horizontal damages in any amount, Crown has made one valid criticism of Dr. Christ's analysis with respect to vertical damages. The "before and after" method used to measure this aspect of plaintiffs' monetary losses is appropriate "only where there has been some showing that the market conditions in the two periods [the damage and the control periods] were similar but for the impact of the violation." *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc., supra* at 1207; *accord, Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1352-53 (3d Cir. 1975).

Here, the control period adopted by Dr. Christ, namely April 3 through September 30, 1973, is not in its entirety fairly representative of the experience of each plaintiff as a Crown dealer during the damage period. Dr. Christ testified that this control period was extended through September 30, 1973, because he wanted a period which was sufficiently long but which would not include the dislocation caused by the oil embargo of the fall of 1973. But, as Crown correctly points out, by including the period after August 24, 1973, Dr. Christ has included the equally disruptive effects of Federal Energy Administration price controls.[17] Although acknowledging that these regulations artificially increased plaintiffs' gross margins, Dr. Christ did not compensate for this favorable treatment because he felt that other market conditions, also not accounted for, must have likewise benefited Crown during the control period. However, Dr. Christ was unable to identify any such conditions, and this Court concludes that there is accordingly no factual support for his use of the longer period. Thus, while Dr. Christ's basic approach for measuring plaintiffs' vertical damages is sound, the Court will not accept the gross margins obtained under the federal price controls as representative of plaintiffs' experiences in the absence of Crown's antitrust violations. The control period for computing vertical damages should therefore extend from April 3 only through August 24, 1973. Even though the period is thus reduced from approximately six months to slightly less than five months, this Court is satisfied on the record here that the period is sufficiently long to serve as a proper yardstick. Using this period, plaintiffs incurred the following losses as a result of Crown's vertical restraints on the retail prices of gasoline: Phillips, $2,298; Tumminello, $6,017; Freitag, $1,188; and Myers, $2,742.

(e) *The Amounts Awarded as Damages*

Subject to the one modification noted, this Court will accept for the purpose of awarding damages the analysis of Dr. Christ and the calculations based thereon. Concededly "an eminent economist", Dr. Christ was fully qualified on the basis of education and prior experience to testify as an expert on damages in a case of this sort. Except as noted, his conclusions are fully supported by the evidence in this case.[18]

Accordingly, this Court holds that plaintiffs have suffered damages in the following amounts as a result of Crown's illegal price-fixing activities:

	Horizontal Damages	Vertical Damages	Motor Oil Damages	Total Damages
Phillips	$30,529	$2,298	$250	$ 33,077
Tumminello	$33,882	$6,017	$250	40,149
Freitag	$22,203	$1,188	$250	23,641
Myers	$44,911	$2,742	$250	47,903
		Total single damages		$144,770

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[17] The extent of this disruption is evidenced by the diminution in plaintiffs' vertical damages if the interval from August 24 through September 30, 1973 is eliminated from the control period.

[18] One of the exhibits in evidence is Dr. Christ's "Final Report on the Monetary Damages Suffered by Plaintiffs * * *." Attached to this Report are various tables which show in detail how the various calculations were made.

These amounts will be trebled pursuant to Section 4 of the Clayton Act, and the separate awards are therefore as follows:

		Treble Damages
Phillips		$ 99,231
Tumminello		120,447
Freitag		70,923
Myers		143,709
	Total treble damages	$434,310

II

Attorneys' Fees

A successful litigant in an antitrust case brought under Section 4 of the Clayton Act is entitled not only to treble damages but also to "the cost of suit, including a reasonable attorney's fee." Plaintiffs have accordingly filed in this case a petition seeking the award of an attorney's fee.

The decision of the Third Circuit in *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (*Lindy I*) adopted new standards for the award of attorneys' fees following the settlement of a national class action in a multidistrict antitrust litigation. Subsequently, in *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (1976) (*Lindy II*), the Third Circuit, in an *en banc* decision, discussed and explained its previous Opinion and ruled on certain other questions presented in that appeal.[19] Other federal courts have applied the *Lindy Bros.*

standards in cases involving class action settlements. *See City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 470-473 (2d Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885, 890 (9th Cir. 1974); *Grunin v. International House of Pancakes*, 513 F.2d 114, 127 (8th Cir. 1975); *Arenson v. Board of Trade*, 372 F.Supp. 1349, 1355 (N.D.Ill.1974); *Liebman v. J. W. Petersen Coal & Oil Company*, 63 F.R.D. 684, 690-91, 701 (N.D.Ill.1974); *In re Gypsum Cases*, 386 F.Supp. 959, 962 (N.D.Cal.1974).

In discussing the proper standards which would govern the award of fees to be paid from a settlement fund, the Third Circuit in *Lindy I* said that the first inquiry of the Court should be into the hours spent by the attorneys, including how many hours were spent in what manner by which attorneys. After determining the time spent, the District Court should then undertake to fix an hourly rate of compensation to be applied to the hours worked. While the amount thus found to constitute reasonable compensation should be the "lodestar" of the Court's fee determination, at least two other factors should be taken into account in computing the value of attorneys' services, namely the contingent nature of success and the extent, if any, to which the quality of an attorney's work mandates either increasing or decreasing the amount to which the Court has found the attorney reasonably entitled. 487 F.2d at 168.

Lindy I and *Lindy II* involved questions pertaining to the award of attorneys' fees from a settlement fund in a multidistrict class action. These consolidated cases, involving antitrust claims asserted by four dealers individually, have resulted in actual trials, one concerning the issue of liability and a second concerning the issue of damages. As plaintiffs prevailed at these trials, the award of attorneys' fees is expressly mandated by Section 4 of the Clayton Act.

Although the principles of the *Lindy* cases would appear to be generally applicable here, the Fourth Circuit has not required the trial court in a Section 4 case to undertake the detailed inquiry mandated by the Third Circuit for the fixing of fees to be paid from a settlement fund in multidistrict litigation. In the latter instance, the fees paid to the attorneys reduce the amounts paid the claimants. Here, the plaintiffs' damage awards will not be diminished by the amount of the fees fixed by the Court, and the abuses which the *Lindy* decisions sought to correct are not present in this case. *See Pitchford v. Pepi, Inc.*, 531 F.2d 92 (3d Cir. 1976). In *Advance Business Systems & Supply Co. v. SCM Corporation*, 415 F.2d 55, 70 (4th Cir. 1969), *cert. denied*, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101 (1970), the Court approved an award of attorneys' fees made by Judge Thomsen of this Court in a Section 4 case. The Fourth Circuit approved Judge Thomsen's consideration of the following factors: "The magnitude and complexity of the litigation, the time and labor spent, the standing of counsel at the bar, and other relevant considerations set out in [his] supplementary opinion." 415 F.2d at 70. In the earlier case of *Osborn* v. *Sinclair Refining Co.,* 207 F.Supp. 856, 864 (D. Md.1962), Judge Thomsen had referred to and relied upon the factors set out in the Canon 12 of the Canons of Professional Ethics of the American Bar Association.[20] Again, on appeal, the Fourth Circuit did not disturb the award. *Osborn v. Sinclair Refining Co.,* 324 F.2d 566 (4th Cir. 1963).

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[19] Both *Lindy* I and *Lindy II* were appeals from decisions of the undersigned Judge, sitting in the Eastern District of Pennsylvania. The lower court Opinions, which discussed many other fee questions besides those considered in the appeals, are reported at 341 F.Supp. 1077 (E.D. Pa. 1972) and 382 F.Supp. 999 (E.D. Pa. 1974).

In this case, the parties agree that the starting point for the award should be the hours spent by the various attorneys and the billing rate applicable to those hours. Plaintiffs have furnished detailed schedules, indicating that the total value of the time spent by the plaintiffs' attorneys amounts to $213,913.50. However, plaintiffs concede that some of this time is not recoverable in this case. These actions were brought under both Section 4 and Section 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. A plaintiff who is granted injunctive relief under Section 16 is not entitled to

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[20] **See A.B.A. Code of Professional Responsibility, DR 2-106(B).**

recover attorney's fees. *Alphin v. Henson*, 538 F.2d 85 (4th Cir. 1976); *Byram Concretanks, Inc. v. Warren Concrete Prod. Co. of N.J.*, 374 F.2d 649, 651 (3d Cir. 1967).

On the basis of time alone, plaintiffs assert that the value of the services for which they should be compensated here is $155,632.50, and they further assert that this figure should be increased because of the contingency and quality factors. A breakdown of the time figures is as follows:

Plaintiffs' Attorney	Time-Hours	Average Rate During Billing Period	Value
Robert G. Levy	381.7	$80	$ 30,536.00
Berryl A. Speert	3.1	70	217.00
Peter H. Gunst	296.6	50	14,830.00
George W. Maugans	1,673.7	40	66,948.00
Allan P. Hillman	1,041.4	40	41,656.00
Michael P. Waxman	41.3	35	1,445.50
Totals	3,437.8		$155,632.50

Time relating to other matters in this litigation for which plaintiffs are not seeking compensation is as follows:

Preliminary Injunction	Time-Hours	Value
Robert G. Levy	50.0	$ 4,000.00
Peter H. Gunst	12.0	600.00
George W. Maugans	352.7	14,108.00
Allan P. Hillman	225.0	9,000.00
Totals	639.7	$27,708.00

Permanent Injunction and Motions to Dissolve	Time-Hours	Value
Robert G. Levy	20.0	$ 1,600.00
Allan P. Hillman	228.7	9,148.00
Totals	248.7	$10,748.00

Post-Trial Motions re C. Frank Tumminello	Time-Hours	Value
Robert C. Levy	30.0	$ 2,400.00
Peter H. Gunst	116.9	5,845.00
George W. Maugans	78.8	3,152.00
Allan P. Hillman	210.7	8,428.00
Totals	436.4	$19,825.00
Totals relating to other matters	1,324.8	$58,281.00

In *Phillips II,* this Court found that Crown had not violated Section 1 of the Sherman Act by restricting plaintiffs in the sale of antifreeze and in the sale of cigarettes, candy and soda through vending machines. Recognizing that they are not entitled to attorneys' fees for time spent in connection with that part of the case, plaintiffs have not included in the above figures any of the time spent in connection with that issue.

In opposing plaintiffs' petition for the award of attorneys' fees, Crown does not claim that the time listed was not actually expended and does not claim that the hourly rates listed are unreasonable rates. However, Crown does contend that plaintiffs' petition does not make a proper deduction for time spent on portions of these proceedings for which no fee may be awarded. In particular, Crown complains that there was insufficient subtraction for the Section 16 aspect of the case and that there was insufficient subtraction for the time spent on claims for which the plaintiffs failed to recover or which were *de minimis.* Crown claims that the time figure should therefore be reduced to $56,938.62, and that no increase at all should be made in this case because of contingency or quality factors. Finally, Crown argues that the attorneys' fee to be awarded in this case should not exceed a reasonable percentage of the single damages awarded.

Various decisions of the Fourth Circuit and of other Courts have recognized that attorneys' fees awarded a successful litigant in a Section 4 case may exceed the amount of single damages. In *Advance Business Systems, supra,* the single damages amounted to approximately $17,000, and the attorneys' fee awarded was some $35,900. In *Osborn, supra,* the original single damage award was $325, and Judge Thomsen allowed an attorney's fee of $14,000.[21] *See also Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders,* 393 F.2d 75 (9th Cir. 1968); *Volasco Products v. Fry Roofing Co.,* 346 F.2d 661 (6th Cir. 1965).

Crown argues that only in "small damages" cases may attorneys' fees exceed single damages. However, in *Volasco Products, supra,* the damages were $25,000 and the fee awarded was double that amount or $50,000. Here, there are four separate damage awards, ranging from $23,641 to $47,903. This Court concludes that in this case the amount of the attorneys' fee awarded should not be limited by the amount of the single damages, provided that the attorneys' fees claimed are otherwise reasonable under all the circumstances.

In claiming that the time figures submitted by plaintiffs' attorneys should be reduced, Crown contends that 50% of the time spent on liability issues should be allocated to Section 16 proceedings. It is further argued that 17% of the Section 4 time should be allocated to antifreeze and vending machine issues, and that 11½ of the Section 4 time should be allocated to motor oil issues. Accordingly, Crown contends that attorneys' fees in this case should be fixed at no more than $56,938.62.

There is no support in this record for the arbitrary deductions suggested by Crown, which are based on conjecture and estimates. On the other hand, plaintiffs' figures are amply supported by the record here. Plaintiffs' attorneys have maintained detailed time records and have made their allocations of time based on these records.[22] In support of their petition, plaintiffs' attorneys have furnished tables showing a precise breakdown of the time spent by each individual attorney in undertaking various kinds of compensable activities.[23] When these tables are reviewed in the light of the records and files of the undersigned Judge and in the light of this Judge's familiarity with all aspects of the case, the Court concludes that plaintiffs' attorneys have properly subtracted from their final figures all time spent on Section 16 aspects of this case and have properly excluded from the final figures submitted all time spent in connection with the antifreeze and vending issues. Total time spent on the issues as to which relief has been granted amounts to 4,762.6 hours. From this total time have been deducted 1,324.8 hours which were spent in connection with Section 16 aspects of this case and in connection with post-trial motions relating to plaintiff Tumminello's claims. Thus, 72% of the total time has been assigned to the issues as to which damages have been awarded. On the record here, this Court concludes that such an allocation of time is a reasonable one.[24] Having been "on the firing line" exposed to the litigants, their strategies, positions and proofs,

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[21] Although on appeal the amount of single damages was raised to $12,000, the fee still exceeded that award.

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[22] Crown has not requested an evidentiary hearing for the purpose of challenging these time record, nor has Crown submitted any records of its own to show the time spent by plaintiffs' attorneys on various parts of this case.

[23] The categories listed include: pleadings, discovery, court appearances, fee application, briefs and research, general matters, trial and trial preparation and damages.

[24] Crown's argument as to the motor oils issue is particularly specious. It was agreed by the parties to fix the single damages for that issue at $250 for each plaintiff, or a total of $1,000. Such a resolution of this question, *inter alia*, saved Crown the expense of paying additional attorneys' fees to plaintiffs which would have been incurred in proving these damages.

Ace Heating & Plumbing Co., Inc. v. Crane Company, 453 F.2d 30, 34 (3d Cir. 1971), the undersigned Judge has thereby had "close and intimate knowledge of the efforts expended and the value of the services rendered." *See Lea v. Cone Mills Corporation,* 467 F.2d 277, 279 (4th Cir. 1972). Based on time alone then, plaintiffs are entitled to recover attorneys' fees in the amount of $155,632.50.

The final question before the Court is whether or not the fees determined on the basis of time alone should be increased because of contingency and quality factors. In *McKittrick v. Gardner,* 378 F.2d 872 (4th Cir. 1967), a case dealing with the allowance of attorneys' fees to lawyers representing claimants to social security benefits, Judge Haynsworth observed in his Opinion that the contingency of compensation should be considered in awarding fees. In his Opinion, he said the following (at 875):

> The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

In *McKittrick,* the Fourth Circuit also approved consideration of the quality factor in awarding attorneys' fees. At page 874-75, Judge Haynsworth said:

> The district judge will know what assistance he received from the claimant's attorney. If, with little or no assistance, he is required to read the entire * * * record, discover the issues and do the basic research in his library before he approaches performance of his ultimate decision-making role, he will know it. He will know it if, in our adversary system, the lawyers have performed superbly or adequately, their function of

> eliminating irrelevancies, pointing up the issues to be decided and supplying the court with the legislative and judicial materials which he must have at hand when he reaches his ultimate conclusion. He will know, too, the worth of their analysis of the relevant materials, for he will have appraised them in depth in coming to his own decision. If the lawyer's performance has been somewhere in between the excellent and the wholly unacceptable, the judge will know it in all of its gradients. The judge who has decided a case, need hold no evidentiary hearing to determine the extent and quality of the assistance he received from the lawyers in reaching his conclusion and in preparing an opinion. The judge may be assisted by a statement of the time spent by the lawyer, though such statements must be subordinate to the judge's evaluations of the lawyer's contribution to the decision. The evidence of a lawyer's fidelity and commitment to his client's cause, which is reflected in his performance in court, may be colored by reports or evidence of extra-legal financial and consultative services rendered by the lawyer to a claimant experiencing difficult, even insolvable, problems while awaiting receipt of the benefits he seeks. In short, the judge may receive supplemental reports and statements from the lawyer in aid of his fee claim * * * but the controlling criterion will remain the quantity and quality of the lawyer's services as observed by the judge in the judicial proceedings.

Both the contingency and quality factors are relevant here. Plaintiffs' attorneys accepted employment on a contingent fee basis. They were opposed by highly skilled defense counsel who tenaciously defended the case at both the liability and the damage phases of the litigation. Plaintiffs' attorneys were faced at the outset with the risk that despite vigorous and competent efforts on their part, success was not guaranteed, and they might receive no compensation at

all for the services performed. *See City of Detroit v. Grinnell Corporation, supra* at 471. In antitrust cases in which counsel are employed on a contingent fee basis, the prospect of compensation beyond standard hourly rates should be held out as an inducement to encourage competent counsel to act as a private attorney general and bring civil actions for the enforcement of the antitrust laws. *Advance Business Systems & Supply Co. v. SCM Corporation,* 287 F.Supp. 143, 161 (D.Md.1968); *Brandenburger v. Thompson, supra* at 888-89; *Dolgow v. Anderson,* 43 F.R.D. 472, 494 (E.D. N.Y.1968); *Hornstein, Legal Therapeutics; The Salvage Factor in Counsel Fee Awards,* 69 Harv.L.Rev. 658, 662-663 (1956).

Of even more significance here is the fact that there had been no criminal prosecution preceding the filing of these civil actions. Rather, it was this private litigation which apparently led to an investigation by the federal government of price-fixing activities on the part of Crown and others, with the result that Crown, various other oil companies, an industry organization and certain individuals have now been charged in this Court with criminal antitrust violations. *United States v. Society of Independent Gasoline Marketers of America,* Criminal No. B-76-0314, filed June 1, 1976. Whatever the outcome of that criminal case, the probability of success in this civil case could not at the outset be judged in terms of a previous successful criminal prosecution. *See Lindy I, supra* at 471. Plaintiffs and their attorneys were therefore compelled to investigate and develop the necessary facts on their own, without the assistance of an earlier criminal case in which public resources had been used to establish *prima facie* violations of the law.

Insofar as the quality factor is concerned, Mr. Robert G. Levy, the senior attorney representing the plaintiffs in this case, is an experienced antitrust practitioner whose standing at the bar is very high. *See Advance Business Systems*

& Supply Co. v. SCM Corporation, 287 F.Supp. 143, 161 (D.Md.1968). It should be noted, however, that his associates in this case are younger members of the bar and have not had his experience in antitrust matters. From a review of the pleadings, briefs and other written materials and from personal observation, this Court finds that plaintiffs' attorneys have been skillful and imaginative in their conduct of this litigation.

Relying on decisions awarding fees in different multidistrict litigation, plaintiffs suggest that the amount determined to be due their atorneys on the basis of a reasonable hourly rate should be doubled or trebled because of contingency and quality factors. In the *Lindy Bros. litigation*, the undersigned Judge applied these factors and doubled certain of the amounts found to be due based on an hourly rate, while not increasing certain other amounts. 382 F. Supp. at 1023-24. In *Lindy II*, the Third Circuit, in a divided *en banc* decision, approved the doubling as being properly within the trial judge's discretion but eliminated certain of the categories. 540 F.2d at 109-116.[25]

But the *Lindy* and other similar opinions in multidistrict cases involved circumstances not present here. The plumbing fixture antitrust litigation, in which various national class actions had been asserted, was no "run-of-the-mill" suit. 382 F.Supp. at 1019. Over 10,000 claims had been filed in the builder-owner settlement alone, and 374 different cases were included in the one massive litigation. This was the largest number of cases of any matter that has ever come before the Judicial Panel on Multidistrict Litigation.

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[25] The two dissenting Judges disapproved of the doubling.

The settlement fund amounted to $29,300,000. Complex and novel questions arose because of the large numbers of plaintiffs competing with each other to establish standing. Because of these and other circumstances there present, figures in *Lindy* based on time alone were doubled.

The present case is not comparable to *Lindy* as to either size or complexity. Nevertheless, this Court is satisfied that because of the contingency and quality factors discussed herein, the amount determined to be due based on time alone should be increased. Applying these factors in the light of the amounts recovered by plaintiffs, this Court concludes that a reasonable attorney's fee in these consolidated cases would be $200,000.[26] Plaintiffs are also entitled to recover costs.

III

Conclusion

An appropriate Order entering the various judgments will be signed by the Court. Whether or not so characterized, Findings of Fact and Conclusions of Law under Rule 52(a) of the Federal Rules of Civil Procedure are embodied in this Opinion and in the earlier Opinion reported at 395 F.Supp. 735, except where Findings in the earlier Opinion have expressly been modified.

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[26] The fees in each case would therefore be $50,000. The amount for all four cases would represent an increase of slightly less than 30% of the value of the total services performed based on considerations of time alone.

Supreme Court, U. S.
FILED
JAN 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-831

CROWN CENTRAL PETROLEUM CORPORATION,
Petitioner,

v.

JOHN T. PHILLIPS, JR., CORRADO FRANK TUMMINELLO,
CHARLES PHILIP FREITAG AND
CARROLL CHARLES MYERS,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

This brief in opposition to petition for a writ of certiorari is submitted on behalf of John T. Phillips, Jr., Corrado Frank Tumminello, Charles Philip Freitag and Carroll Charles Myers, the successful plaintiffs in these consolidated private antitrust actions for damages and injunctive relief. The cases were instituted in 1973 by them pursuant to 15 U.S.C. 1, 15 and 26 against their supplier-landlord, defendant Crown Central Petroleum Corporation ("Crown"), a refiner and marketer of gasoline.

In an event unusual in antitrust enforcement, as a result of these private actions alleging *inter alia*, horizontal retail price-fixing of gasoline in the Baltimore metropolitan area, the United States convened a grand jury and ultimately secured an indictment and conviction of Crown's co-conspirators on charges of horizontal price-fixing, involving approximately seventeen billion gallons of gasoline valued at some four billion dollars, in seven Middle Atlantic states from Virginia to New York. *United States v. Soceity of Independent Gasoline Marketers of America, et al., ("U.S. v. SIGMA"),* Criminal No. B-76-0314 (D. Md.), convictions affirmed, 1979 Trade Cases ¶ 63,097 (4th Cir. 1979).

The Opinion of the United States Court of Appeals for the Fourth Circuit, from which Crown petitions for a writ, affirmed the opinions of the United States District Court for the District of Maryland holding, *inter alia*, that Crown violated Section 1 of the Sherman Act by engaging in horizontal and vertical conspiracies to fix the price of gasoline, and that plaintiffs were entitled to damages for the overcharges they paid to Crown as a result of the horizontal price-fixing conspiracy among Crown and its oil company competitors, a conspiracy which was designed to maintain and increase the revenues and profits which Crown derived from the sale of gasoline to plaintiffs and its other dealers.

Crown's petition confuses essential facts upon which the damage award is predicated; facts which refute its argument that plaintiffs did not purchase gasoline from it at unlawfully fixed wholesale prices. Crown next misconceives the rules established by this Court governing the applicability of the pass-on defense, ignoring both the facts of this case and pertinent authority. Crown seeks here to redefine this Court's holding in *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977) (*"Illinois Brick"*) in order to support its view that, because it is guilty of two *per se* violations of Section One of the Sherman Act, 15 U.S.C. 1, rather than one such violation, plaintiffs, the direct purchasers of gasoline from it at unlawfully fixed prices, and the victims of both *per se* violations, should be denied all recovery under the antitrust laws.

As this brief will demonstrate, Crown has advanced contradictory arguments before the courts in this case, in search of the goal of avoidance of damage liability for its established violations of the Sherman Act. This is not an interest which supports review of the case in accordance with Rule 19 of this Court.

OPINIONS BELOW

Crown's statement in this section of its petition, indicating that the Court of Appeals was "divided" (Petition, hereinafter "Pet.", p. 2), should be placed in proper context.

On July 2, 1979 the United States Court of Appeals for the Fourth Circuit (in an opinion by Wilson Cowen, Senior Judge, joined by Clement Haynsworth, Chief Circuit Judge) affirmed findings of fact and conclusions of law by the United States District Court for the District of Maryland (Alexander Harvey, J.) establishing, *inter alia*, (a) that Crown and its co-conspirators, other "independent" oil companies and an industry trade association, had engaged in unlawful horizontal price-fixing; (b) that Crown had engaged in unlawful vertical price-fixing by coercing its lessee-dealers to charge retail prices dictated by Crown; and (c) that plaintiffs were entitled to the award of damages as a result of being overcharged direct purchasers from Crown at wholesale prices which were necessarily unlawfully fixed as a result of a Crown formula by which the wholesale price charged to plaintiffs was determined mechanically and automatically from the retail prices which were unlawfully fixed by the horizontal conspiracy among Crown and its co-conspirator oil companies. 602 F.2d 616 (4th Cir. 1979) (Pet. App. A, p. 1a *et* *seq)*.[1] The purpose of the horizontal conspiracy was not to enhance the revenues and profits of service station dealers supplied by Crown and the oil company co-conspirators, but rather to maintain and increase the profits of Crown and its co-conspirators.

Circuit Judge Widener, concurring in part and dissenting in part, stated "I concur with the substantive holdings of the panel . . . ." 602 F.2d at 636. His dissent was based solely on one aspect of the District Court's conduct of a hearing. 602 F.2d at 636 (Pet. App. A, p. 34a).

On August 27, 1979, the Fourth Circuit denied Crown's motion for a rehearing (Pet. App. B).[2]

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[1] References herein to "Pet. App." are to the appendices accompanying Crown's petition. References to "Res. App." are to the appendices accompanying this Respondent's Brief in opposition to the petition.

[2] In view of his concurrence with the Court in its "substantive holdings" (*supra*), the dissenting Judge's vote to grant rehearing was predicated again on the District Court's conduct of a hearing, which was one of the grounds for rehearing urged by Crown. Crown has not presented that issue here; it has presented no issue with respect to the Court of Appeals' affirmance of the findings of price-fixing which are the basis of the permanent injunction (Pet. p. 4, n. 1). The issue presented here by Crown concerns solely the award of overcharge damages, which are the only damages awarded plaintiffs (Pet. pp. 3, 4, n. 1).

Thus, none of the three appellate Judges believed that a review by this Court would be appropriate, a conclusion reaffirmed by the Court's unanimous refusal, on September 6, 1979, to stay its mandate pending the filing of Crown's petition for *certiorari* (Res. App. A). Under the rules of the Fourth Circuit, a stay will be granted when a Judge concludes that "a substantial question is to be taken to the Supreme Court of the United States." (See, "Policy Statement: Stays of Mandates," by the United States Court of Appeals for the Fourth Circuit) (Res. App. B).

QUESTIONS PRESENTED

The four Crown lessee-dealer plaintiffs in this case were the direct purchasers from defendant Crown. The wholesale prices which they paid to Crown for gasoline were not merely, as Crown states, "influenced" by the fixed retail prices, nor did they bear merely "some" relationship to those prices (Pet. p. 3, 7). The wholesale overcharge was not, as Crown states, "presumed." (Pet. p. 12). Rather (as admitted by Crown, as embodied in its documents, and as found by the Court of Appeals and the District Court), in accordance with a predetermined formula employed by Crown, the wholesale prices Crown charged to plaintiffs were necessarily fixed and established automatically from the retail prices — which retail prices were unlawfully established as a result of a horizontal price-fixing conspiracy among Crown and its oil company co-conspirators. The question presented here is whether, where the dealers were direct purchasers at unlawfully inflated wholesale prices, and the Court of Appeals has affirmed an overcharge damage award in recognition of the basic principles set forth by this Court in *Illinois Brick* and in *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (*"Hanover Shoe"*), this Court should nevertheless grant *certiorari* for the purpose of abrogating those basic principles.

STATEMENT OF THE CASE

A. *The Liability Case*

Plaintiffs filed these consolidated actions, hereinafter referred to as *"Phillips v. Crown"*, in April and May, 1973. After these suits were filed, Crown notified each plaintiff that it would not renew his lease. Following discovery and a hearing, the District Court issued a preliminary injunction enjoining such non-renewal *pendente lite*. 376 F. Supp. 1250 (D. Md. 1973). Following further extensive discovery, the liability case was tried to the Court during four weeks in late 1974. After hearing testimony from over forty witnesses and reviewing some 250 exhibits, (JA. 2652-53)[3], the District Court issued an Opinion containing 98 findings of fact, holding *inter alia* that Crown had engaged in unlawful horizontal and vertical price-fixing, that it had unlawfully sought to terminate plaintiffs' leases, and that plaintiffs' were entitled to a permanent injunction and treble damages. 395 F. Supp. 735 (D. Md. 1975) (Pet. App. C). Crown appealed from this liability judgment.

On February 17, 1977, while Crown's liability appeal was pending, the District Court issued its opinion on damages and attorneys fees. 426 F. Supp. 1156 (D. Md. 1977). After the Court of Appeals initially remanded the original liability opinion for a hearing in April, 1977, 556 F.2d 702 (4th Cir. 1977), the District Court held the hearing, and, after consideration of further submissions by the parties, reaffirmed its holdings of unlawful horizontal and vertical price-fixing. 1977 Trade Cases ¶ 61,599 (D. Md. 1977). Crown then appealed both the liability and damage judgments. On July 2, 1979, the Court of Appeals affirmed the District Court's findings of illegal horizontal and vertical price-fixing in the Baltimore metropolitan market and findings of unlawful lease terminations. The Court affirmed the award of damages for the overcharge resulting from the price-fixing. 602 F.2d 616 (4th Cir. 1979) (Pet. App. A).

The gravamen of this case was the charge that Crown conspired with other non-major ("independent") oil companies in order to eliminate price competition in the Baltimore metropolitan market. Crown's profits were secured from sales of gasoline to its dealers, at wholesale prices fixed in accordance with an immutable formula based upon the (horizontally fixed) retail prices. Thus, Crown's only interest in participating in the conspiracy, increasing retail prices by agreement with its horizontal co-conspirators, was to maintain and increase its own profits secured from wholesale sales to plaintiffs and its other dealers, in its most important marketing area.[4] The purpose of the horizontal price-fixing conspiracy was *not* to increase the profits of retail service station dealers, and horizontal price-fixing was not engaged in by those service station dealers; it was engaged in by the oil companies which supplied those dealers (or, in some cases, by the oil companies which supplied their own company-operated service stations) in order to maintain and increase their profits.

As set forth in the Court of Appeals Opinion, 602 F.2d at 635 (Pet. App. A, pp. 32a-33a) and the District Court liability Opinion, 395 F. Supp. at 742-43, 747 (Pet. App. C, pp. 47a-48a, 56a), the pricing structure of the market was substantially affected by the price level at which the "independent" marketers sold. Such marketers included Crown, Amerada Hess Corporation ("Hess") (which, like Crown, marketed through independent lessee-dealers), Petroleum Marketing Corporation ("PMC") (which resold gasoline through its company [not dealer] operated "Scot" stations), Ashland Oil Inc. ("Ashland"), (which supplied and later acquired BiLo and Red Head service stations), and Meadville Corporation (which resold through "Saveway" company-operated stations).

The independents, which traditionally did not engage in the broad-scale service bay operations or advertising of the major oil companies, competed with the majors by maintaining a differential in price below the majors. The "accepted" differential was approximately two cents; if the independents engaged in price competition among themselves which drove their prices lower and widened the differential, the major oil companies would react by instituting voluntary allowances (wholesale price discounts to their dealers), necessarily established across wide price "zones", reducing the majors' level of pricing. Thus, the overall price level of the entire market would be reduced; the wholesale prices and profits of an "independent" oil refiner such as Crown would be reduced if the independents did not avoid the price competition which reduced their retail prices and which induced retaliation by the major oil companies.

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[3] References to "JA" are to the Joint Appendix filed by the parties in consolidated appeals No. 77-1780 and No. 78-1078, which resulted in the opinion from which Crown now seeks review.

[4] Crown's headquarters are in Baltimore and, by 1973, it was the fifth ranking gasoline marketer in Maryland, surpassing many "major" oil companies. 395 F. Supp. at 741 (Pet. App. C, p. 43a).

Crown was well aware of the dangers to its wholesale prices and profits which price competition among the independents posed, and acted in concert with its independent oil company competitors to prevent price competition and to eliminate the extremely rare (602 F.2d at 632; Pet. App. A, p. 26a) instances of price competition among the independents. A particularly clear example, cited by the District Court, 395 F. Supp. at 742-43, (Pet. App. C, pp. 47a-48a) and Court of Appeals, 602 F.2d at 623, (Pet. App. A, p. 8a) was the effort by Crown's Manager of Administration (Marketing) (its pricing manager) Wilbur Pressler to halt an incident of price competition which broke out in West Baltimore. Pressler testified that he interceded with executives of Ashland and Meadville to restore prices to higher levels since "a continuation of price-cutting was going to hurt the entire market area and that no one [of the conspirators] was going to profit from it." (JA 334). When asked whether his purpose was to stop price competition in Baltimore, Pressler conceded that "it could possibly be construed that that would have been

the motive." (JA 336; see 602 F.2d at 623; Pet. App. A, p. 8a).[5]

The evidence established that Crown and its co-conspirators consulted with each other in order to avoid price competition; to eliminate the few instances of price competition which arose; and to notify each other of planned future price movements in order to achieve coordinated price increases (or, on the rare occasions when a price decrease was deemed necessary, to discuss and explain this in advance in order to avoid a reaction by other independents). Crown's communications with Pricing Manager Irving Grossman of Hess were particularly notable; Crown pricing managers maintained contact with Hess, its chief competitor, to discuss and resolve any problem involving the threat of price competition (E.g., JA 295-97, 315-16).[6]

The District Court, in its findings of fact, 395 F. Supp. at 742-46 (Pet. App. C, pp. 46a-54a) and its discussion, 395 F. Supp. at 757-59 (Pet. App. C, pp. 76a-79a) and the Court of Appeals in its discussion, 602 F.2d at 623-24 (Pet. App. A, pp. 8a-10a) outlined the evidence of advance notification of and discussion of price movements among Crown and its co-conspirators Hess, PMC, Ashland and Meadville; their agreements (express and implied) to eliminate price competition; and their use of an industry organization, the Society of Independent Gasoline Marketers of America ("SIGMA"), to inform the conspirators of future price increases, to coordinate such increases, and to act to stamp out isolated instances of price competition which threatened market stability and the profits of the conspirators. This evidence was based almost exclusively on testimonial and documentary admissions by representatives of the conspirators.[7]

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[5] Pressler's assistant pricing manager testified that incidents of price competition, if not stamped out, would spread into a price war across the city "like cancer" (JA. 1909). He testified that this was a particular problem for Crown in Baltimore, its headquarters, since "Crown is a lot more concentrated in Baltimore than any other company." (JA. 1913). By 1972 Crown supplied gasoline to 34 high volume "multi-pump" stations in Baltimore (JA. 1772).

[6] Both Crown and Hess pricing chiefs confirmed that even isolated instances of discount pricing, if unchecked, would generate widespread competition by forcing major oil companies to react across wide geographic areas (JA 310-11, 327-28); 395 F. Supp. at 742-43 (Pet. App. C, pp. 47a-48a). Grossman of Hess testified that such reactions would occur even if the "differential" widened to 3-4 cents and, when one major reacted, this would cause a chain reaction, and a large scale price war (JA 310-11).

The Court of Appeals concluded that the District Court's finding of horizontal price-fixing among Crown and its co-conspirators were supported by a "formidable array of evidence" which confirmed that "Crown participated in an elaborate conspiracy . . . to fix the retail price of gasoline in the Baltimore area in the early 1970s." 602 F.2d at 625 (Pet. App. A, p. 12a).[8]

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[7] Documentary admissions of horizontal price-fixing are, of course, rare gems. Co-conspirator PMC's wholesale sales manager Jack Curlett, however, was a copious record keeper; in one 1971 diary entry, he reported on a meeting with a company which operated retail service stations in competition with PMC and other conspirators:

> We are working to get them to get prices up in Baltimore area. Call Hess and Saveway — have Grossman call Jim (JA. 1927-28).

[8] The District Court found further (and the Court of Appeals affirmed) that Crown coerced its dealers to charge retail prices dictated by Crown (vertical price-fixing) — a necessary device by which Crown (which had dealer, not company-operated stations) insured that its horizontal agreements with its competitiors were carried out. 395 F. Supp. at 761 (Pet. App. C, p. 83a); see 602 F.2d at 626 (Pet. App. A, p. 14a). The District Court's findings of fact (hearinafter "FF") concerning vertical price-fixing, FF 33-44, 47-74; see 395 F. Supp. at 746-54 (Pet. App. C, pp. 54a-69a) begin with a documentary admission (FF 35) by Crown's Vice-President that supposedly independent Crown

Phillips v. Crown, a private action, is a rare event in antitrust enforcement. As the District Court stated in its opinion on damages and attorneys fees, 426 F. Supp. at 1174 (Pet. App. D, p. 135a), as a result of this case, alleging horizontal price-fixing in Baltimore, the United States undertook a grand jury investigation of horizontal price-fixing by Crown and its co-conspirators. On June 1, 1976 Crown, its co-conspirators in *Phillips*, and others, were indicted for conspiracy to horizontally fix retail gasoline prices in Maryland, New York, New Jersey, Pennsylvania, Delaware, Virginia, and the District of Columbia, a conspiracy involving approximately 17 billion gallons of gasoline valued at some four billion dollars. *U.S. v. SIGMA, supra.* After a three month trial, on August 29, 1977, nearly every corporate defendant, including co-conspirators here Hess, PMC, Ashland, Meadville and SIGMA, as well as Kayo Oil Company, were found guilty by a federal court jury in Baltimore. The only corporate defendant (aside from the parent of Kayo, which was exonerated on a question of corporate control) which escaped was, ironically, Crown, the only local company. Crown, however, stands adjudged liable by a clear preponderance of the evidence in *Phillips v. Crown*, a judgment it has not presented to this Court for review. The convictions of the corporate defendants in *U.S. v. SIGMA* were

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dealers' pump prices were instead to be set "at Crown's discretion", an admission the Court of Appeals found "devastating". 602 F.2d at 626-27 (Pet. App. A, p. 15a); see 395 F. Supp. at 746-47 (Pet. App. C, p. 55a). This document also set forth the Crown formula which established that a dealer's *wholesale* price was entirely dependent upon and moved in a fixed relationship with the retail price (FF 35, 38; see 395 F. Supp. at 746-47, 758) (Pet. App. C., pp. 55a-56a, 78a). See 426 F. Supp. at 1161 (Pet. App. D, pp. 107a-108a). Substantial evidence supporting the vertical price-fixing findings was presented through non-party witnesses. 602 F.2d at 627 (Pet. App. A, p. 16a); 395 F. Supp. at 748, 751-53 (FF 47, 62-70; Pet App. C, pp. 58a, 64a-67a). The vertical price-fixing findings were supported by "ample" evidence. 602 F.2d at 626 (Pet. App. A, p. 15a).

affirmed on December 26, 1979. 1979 Trade Cases ¶ 63,097 (4th Cir. 1979).[9]

B. *The Damage Award*

The District Court found that the horizontal price-fixing conspiracy was "largely successful". 395 F. Supp. at 746 (Pet. App. C., p. 54a). Like most conspiracies, it was not 100% successful; it was the failure of Crown and its co-conspirators to enlist a non-conspirator in their price-fixing efforts which furnished plaintiffs' economist a basis, unusually concrete for antitrust damage analysis (compare *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-67 (1946)), upon which to calculate plaintiffs' "overcharge" damages resulting from the conspiracy.[10]

As the District Court found, Crown attempted, but failed, to enlist the support of Phillips Petroleum, a "major" oil Company, in raising prices in the York and Padonia Road area of suburban Baltimore. (This is a major artery which feeds downtown Baltimore; JA. 2044.) A dealer-operated Crown station competed in that area with co-conspirator Hess and Scot (PMC) stations, and with Phillips Petroleum. In 1971, in an effort to stabilize prices in the area, Crown contacted Phillips Petroleum in

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[9] Circuit Judge Widener, who concurred in the "substantive holdings" of the panel in *Phillips v. Crown,* was also on the panel in *U.S. v. SIGMA*. He concurred in all convictions of the corporate defendants in *U.S. v. SIGMA,* with one exception resulting from a disagreement regarding a question of evidentiary use of hospital records. 1979 Trade Cases ¶63,097 at p. 77,461.

[10] Crown does not challenge here the calculation of damages; again, it contends only that plaintiffs were not the overcharged direct purchasers (Pet. p. 3). Crown ignores the fact that the *overcharge* which the participant in the conspiracy (Crown) received was obtained from plaintiffs and other Crown dealers, the direct purchasers from the conspirator.

Maplewood, New Jersey for the purpose of causing the competing Phillips station to raise its retail prices. However, Crown was unsuccessful in inducing Phillips Petroleum to participate in curing this rare instance of price competition. It was reported to Crown Vice-President of Sales Loving, as he admitted, that the communication with Phillips Petroleum had yielded "No Action. No results. No action." (FF 19, 395 F. Supp. at 743) (Pet. App. C, pp. 48a-49a). Crown Regional Manager Cahir advised Loving of the situation, and Loving informed Cahir that Crown would have to maintain a lower wholesale price to its dealer in that area, Crown station number "P-57" (JA. 369). Crown and its co-conspirators admitted, as discussed *supra*, that such an area of price competition threatened the stability of the entire market, a matter of particular concern to Crown, which was admittedly more "concentrated" in the Baltimore area than any other company (JA. 1913).[11]

Plaintiffs' expert damage witness was Dr. Carl F. Christ, Professor of Economics at The Johns Hopkins University. Dr. Christ, who has also held professorial positions in economics at the University of Chicago and at foreign universities, has been one of the Editors of the *American Economic Review*, and was published in the *Congressional Record* in 1974 concerning the "United States Oil Problem." Dr. Christ also holds a degree in physics, has taught at Princeton University, and partcipated in the Manhattan Project (JA. 2149-54). He was recognized by Crown and the

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[11] Crown Baltimore District Manager Gillespie admitted that Crown's policy was to achieve at its dealer stations "uniformity of price," and a stable market (JA. 457-58). Crown admitted that it informed its dealers that its policy was uniform dealer pricing (JA. 756-58). (It did so admittedly at the same time that it informed them that their leases could be cancelled without cause on five days notice (JA. 749)). Moreover, the market *was* stable — and there were several periods of time during the damage period, one of approximately six months, during which *all* Crown dealers were charged the same price. (JA. 2108).

District Court to be an "eminent" economist (JA. 2149, 2273; 426 F. Supp. at 1169) (Pet. App. D, p. 125a).

In its damage opinion, the District Court restated the basic finding ignored here by Crown:

> Although this Court has concluded that Crown conspired with its competitors horizontally to fix the *retail* prices of gasoline, the resulting injury to the plaintiffs arises because of the wholesale prices charged by Crown. Such is the necessary result of Crown's method of pricing its gasoline. Because Crown first decided on the appropriate retail price to be charged for its gasoline and then worked back to the wholesale price to be charged the dealer (citation omitted) any artificially high *retail* price necessarily increased the *wholesale* price above the competitive level (citation omitted). 426 F. Supp. at 1161 (Pet. App. D., pp. 107a-108a) (emphasis by the Court).[12]

The District Court, 426 F. Supp. at 1161-62 (Pet. App. D, pp. 107a-110a) and Court of Appeals, 602 F.2d at 632 (Pet. App. A, pp. 26a-27a) explained Dr. Christ's calculation of the overcharge to plaintiffs as a result of the horizontal price-fixing. Dr. Christ calculated the overcharge to plaintiffs as follows: The overcharge was the average per gallon difference between Crown's wholesale price charged to plaintiffs and the wholesale price charged to Crown station[s] in Baltimore having the lowest wholesale price during each day of the damage period.[13] Then, after applying the Crown formula (*supra*) (which allowed a dealer a 1/4 cent increase in margin for each 3/4 cent increase in Crown's wholesale price) Dr. Christ obtained the average wholesale price differential applicable to each dealer. This figure was multiplied by the gallonage actually sold by each plaintiff during the damage period (November 24, 1970 — April 3, 1973). See 602 F.2d at 632 (Pet. App. A, pp. 26a-27a); 426 F. Supp. at 1161-62 (Pet. App. D, pp. 107a-110a).

As the District Court noted, this calculation no doubt understated plaintiffs' damages because it did not provide for any overcharge damages when all of Crown's dealer prices were uniform — which occurred repeatedly and once lasted up to six months (JA. 2108) (reflecting the achievement of Crown's goal of uniformity and periods of perfection in the conspiracy). 426 F. Supp. at 1162 (Pet. App. D, p. 110a). The single damage award to each plaintiff was less than one cent per gallon of gasoline which he purchased from Crown during the damage period (JA. 2189).

In view of the "largely successful" conspiracy, Crown's objective to achieve uniform, stable dealer pricing, the "predetermined" and "fixed" relationship between Crown's retail and wholesale prices, and the evidence of the effect of the rare failure of the conspiracy at York and Padonia Roads (in view of "no results" from the call to Phillips Petroleum), Dr. Christ and the District Court and Court of Appeals viewed his method as a good (albeit conservative) means by which to estimate the overcharge. With respect to the choice of the lowest Crown price as the basis for the differential, Dr. Christ testified:

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[12] In its liability opinion, the District Court found that there was a "fixed and constant relationship between the [Crown wholesale and retail] prices" 395 F. Supp. at 758 (Pet App. C, p. 78A). This was in accordance with the Crown formula, which determined the wholesale price "by deducting a predetermined margin from the actual retail price to be posted by the dealer". FF 38; see FF 35, 395 F. Supp. at 746-47 (Pet. App. C, pp. 55a-56a).

The Court of Appeals confirmed the accuracy of these findings, holding that the retail price "predetermined" the wholesale price. 602 F.2d at 632 (Pet. App. A, p. 26a) and that there was a "fixed relation" between the Crown wholesale and retail prices during the conspiracy period. 602 F.2d at 633 (Pet. App. A, p. 29a).

[13] Station P-57, the Crown station located at York and Padonia Roads where Crown's price-fixing efforts with Phillips Petroleum failed, was often but not always charged the lowest wholesale price. For example, the West Baltimore price disturbance (discussed *supra*) caused the Crown station there to be charged a low price until Pressler arranged to end the competiton. As the Court of Appeals held, price competition among the conspirators was virtually non-existent. 602 F.2d at 632 (Pet. App. A, p. 26a) and the wholesale prices charged to plaintiffs were usually higher and *never* lower than the lowest Crown wholesale price (the so-called "P-57" price) in town. 602 F.2d at 632 (Pet. App. A., pp. 26a-27a).

> [W]here you have a situation [in] which there are several firms in business and one says to another, "let's combine", and the other one says, "No", then you have to regard the price that is so achieved as a good measure of the competitive price." (JA. 2136)[14]

The Court of Appeals held, 602 F.2d at 632 (Pet. App. A, pp. 28a-30a) (a) that any "pass-on" was not chosen voluntarily by the dealers but was insisted on by Crown; (b) that "during the conspiracy period the wholesale and retail price moved in a fixed relation"; and (c) that this "immutable ratio" would *not* have applied in the absence of a conspiracy, citing PX 69, Table D (in which Dr. Christ demonstrated that, after the period, when plaintiffs were free to post prices of their choosing, there was no automatic fixed relation). The Court held further:

> Thus we cannot say with certainty that the wholesale overcharges did not injure the Crown dealers. We know that absent a conspiracy Crown's wholesale prices would have been lower. We do not know what the dealers would have charged at retail. If, in fact, a conspiracy-imposed increase in retail prices did not significantly reduce sales, it would not have been surprising if the dealers had "found" those advantageous prices in a free market. Thus Crown's pass-on argument runs afoul of the specific teaching of *Hanover Shoe*: "Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued . . . . [E]stablishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures." *Hanover Shoe, Inc.* . . . . 602 F.2d at 633 (Pet App. A, p. 29a) (footnote omitted).

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[14] Crown's expert understood — he testified that he could see that, where "there was an agreement among the conspirators that the price would not have gotten as low as it did" but where Phillips Petroleum would not go along, "[t]hey were dragged down to the level that [Phillips Petroleum] was willing to pump at." (JA. 2045). The Court of Appeals found Dr. Christ's methodology to be a "good yardstick" in estimating the overcharge. 602 F.2d at 632 (Pet. App. A, p. 27a).

Accord, *Illinois Brick*, 431 U.S. at 725, n.3.[15] Moreover, as this Court recognized in *Hanover Shoe* (and as cited by the District Court here, 426 F. Supp. at 1167-68 (Pet. App. D, p. 122a):

> The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement

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[15] As Dr. Christ testified, the appropriate question to ask a plaintiff, which was unanswerable, was what prices he desired to charge during the conspiracy period but "in the absence of either vertical or horizontal price-fixing and in the presence of all the consequences that removal of price-fixing would create" (JA. 2123-24). Avoidance of such a fruitless and complex inquiry is the essential rationale of *Hanover Shoe* and *Illinois Brick*; see *Illinois Brick*, 431 U.S. at 725-26; Id. at 730-35, 737, 740-42. Permitting the "pass-on" defense here would have placed the impossible burden on indirect purchasers to demonstrate what they would have paid for gasoline — directly contrary to the holdings of *Hanover Shoe* and *Illinois Brick*.

> merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it. 392 U.S. at 493, n. 9.

It may be appropriate in view of these citations to discuss one of Crown's contentions at this point. Since the Court of Appeals held that "there was general agreement that maintenance of these [fixed] prices did not cause a loss of retail sales," 602 F.2d at 632 (Pet App. A, pp. 26a-27a), Crown contends that plaintiffs (who, under the fixed Crown "formula", realized an additional ¼ cent in margin when Crown raised its wholesale prices by ¾ cent) necessarily gained from the conspiracy (Pet., p. 7). This contention is erroneous, as the Court of Appeals itself held. It recognized (as just cited) that the wholesale overcharges may well have injured plaintiffs; that wholesale prices would have been lower absent the conspiracy but that we do not and cannot know what prices the plaintiffs would have charged at retail or what pricing opportunities would have been presented in a non-conspiratorial market.[16] The Court of Appeals recognized that, in any event, as this Court held in *Hanover Shoe*, (quoted, *supra*) even if it could be proven that the conspiracy prices did not cause a loss in sales, that is irrelevant to plaintiffs' right to recover the unlawful overcharge. 602 F.2d at 633 (Pet. App. A, p. 29a).[17]

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[16] As the Court of Appeals found, the evidence indicated that the dealers would have priced independently of the Crown formula if permitted to do so. In this regard, see not only the evidence cited by the Court of Appeals, PX 69 Table D, but also the District Court's findings of fact 47-48, 55-57, 59, 61; 395 F. Supp. at 748-51 (Pet. App. C, p. 58a, 61a-63a, 65a-67a) demonstrating that plaintiffs sought unsuccessfully *during* the conspiracy period to charge prices other than those mandated by Crown.

[17] It might also be noted that the District Court found "[convincing]" evidence that, in the absence of the conspiracy, plaintiffs' sales would have risen. 426 F. Supp. at 1160 (Pet.

As the Court of Appeals recognized, relying on *Hanover Shoe*, the damage here is the overcharge, not an assessment of lost profits. Crown's oft-repeated view that plaintiffs must demonstrate lost profits (Pet. p. 7, 14, 15n) is thus erroneous. As this Court held in *Hanover Shoe*, a lost profits analysis is arguably relevant *only* where (in contrast to the present case), *no* differential can be proved:

> We also recognize that where *no differential can be proved* between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer. 392 U.S. at 494. (Emphasis added)[18]

ARGUMENT

In view of the presentation in the foregoing Statement of the Case, necessarily embracing some elements of "argument", plaintiffs' response to Crown's contention here may be limited. Crown's contention is the faulty claim that plaintiffs are not the direct purchasers from it because the wholesale price was supposedly not fixed but only "influenced" as a result of the conspiracy (Pet. p. 3; "Question Presented"). Crown states that the effect of the horizontally fixed retail prices on its wholesale prices was merely "assumed" by the Courts (Pet. p. 12). It has already been

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App. D, p. 107a). It may be that the Court of Appeals' statement (indicating "general agreement" that the conspiracy did not cause a loss in gallonage) relates to the fact that plaintiffs' annual sales increased in each year of the conspiracy. (See 395 F. Supp. at 741-42, FF 8, 12) (Pet. App. C, pp. 44a-45a) The Court of Appeals recognized, citing *Illinois Brick*, that "[n]o dealer was 'insulated from any decrease in its sales' when Crown raised retail prices." 602 F.2d at 634, n.4 (Pet. App. A, p. 30, n. 4).

[18] As discussed in the next section of this Brief, while arguing "pass on" vigorously before the District Court, Crown *explicitly abandoned* that claim before the Court of Appeals, and claimed only that plaintiffs could only recover lost profits, not the overcharge.

demonstrated, however, that Crown tied the wholesale price which it charged its dealers to the horizontally fixed retail price by a "fixed", "predetermined" and "constant" formula. (As dicussed previously, it is obvious that Crown's purpose in conspiring horizontally with its competitors was the goal of maintaining and increasing the revenue and profits which it received from wholesale sales of gasoline to its dealers). Thus, while the District Court found that Crown and its co-conspirators did not enter into horizontal agreements to fix their "wholesale" prices, 395 F. Supp. at 757, n. 7 (Pet. App. C, p. 77a), both the District Court and Court of Appeals found (as discussed *supra*) that, because of Crown's pricing formula, the necessary and automatic effect of the horizontal retail price-fixing conspiracy between Crown and its competitors was to fix the wholesale prices Crown charged to its dealers. This evidence, and these findings, refute the sole "question presented" by Crown (Pet., p. 3).[19]

While Crown submits to this Court questions involving *Illinois Brick*, it is noteworthy that Crown's position in this case has changed in accordance with its perceived opportunities. Thus, as the District Court held, Crown's principle argument before it, against plaintiffs' overcharge damages (apart from the routine contention advanced in every antitrust case that the estimate was "speculative") was that the pass-on defense applied and barred plaintiffs from such a recovery. 426 F. Supp. at 1162 (Pet. App. D, p. 104a). The District Court devoted a principle portion of its damage opinion to a discussion of and rejection of Crown's assertion of a pass-on defense. 426 F. Supp. at 1166-68 (Pet. App. D, pp. 118a-123a).

Crown admits here that the Court of Appeals did no more than affirm the District Court's overcharge damage award (which is now the sole award of damages in this case) (Pet. p. 2). Yet, Crown now advances the argument before this Court that *Illinois Brick*, this Court's 1977 reaffirmance of *Hanover Shoe*, somehow must invalidate the District Court's overcharge award, as affirmed by the Court of Appeals. If Crown seriously believed that *Illinois Brick* had this effect, it may reasonably be concluded that Crown would have made this argument in its 1978 Brief and/or Reply Brief before the Court of Appeals. Yet Crown not only did not make the argument — it never even cited *Illinois Brick* in either of these appeal briefs. In fact, on appeal, Crown withdrew its entire pass-on argument and stated that it was making only one argument with respect to these damages. In its principal appellate brief, dated April 3, 1978, at pp. 69-70, Crown stated:

> We submit that *Hanover* is simply irrelevant to the issues raised here. There is no contention that plaintiffs cannot recover because they "passed-on" any increased price to their customers. Our only contention is that even if retail prices control wholesale prices, rather than vice versa, the court's rationale cannot support the notion that plaintiffs were damaged by any agreement fixing their retail prices at higher levels than would have been charged but for the conspiracy. We note there was no claim by plaintiffs for lost profits based on decreased volume resulting from the allegedly higher retail prices.

Thus, Crown's "only contention" in 1978 was that plaintiffs could recover solely lost profits. The lack of merit of that position has already been discussed in the immediately preceding section of this brief.

Only after the Court of Appeals ruled adversely to it did Crown even mention *Illinois Brick*. In its Petition for Rehearing (July 20, 1979) Crown argued for the first time, that, under *Illinois Brick*, plaintiffs were not the direct purchasers, and were barred from a damage recovery.[20]

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[19] "A 'direct' purchaser in this context is one who [like plaintiffs here] buys directly from the antitrust violator, whereas an 'indirect' purchaser is situated further down the chain of distribution." The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 221, n. 2 (1977).

The final argument to which Crown adverts (Pet. pp. 11-13), raised now for the first time in this seven year old case, is essentially a standing argument: Crown urges that, because it also engaged in vertical price-fixing, coercing plaintiffs to post prices dictated by Crown, plaintiffs should not be viewed as "direct purchasers" from it under *Illinois Brick*. Nothing in *Illinois Brick* supports this speculative extrapolation; indeed *Illinois Brick* makes clear the very narrow scope of *any* exception which it permits to the direct purchaser rule of *Hanover Shoe*. See 431 U.S. at 736, 744-45. "*Hanover Shoe* itself implicitly discouraged the creation of exceptions to its rule barring pass-on defenses, and we adhere to the narrow scope of exemption indicated by our decision there." 431 U.S. at 745.

The two Third Circuit Court of Appeals decisions cited by Crown (by analogy) only serve to reinforce plaintiffs' position here. Each case discusses an exception granting standing to sue for damages to otherwise indirect purchasers where a price-fixing manufacturer has set up a corporate "shell", collusively inserting a wholly-owned controlled subsidiary between itself and other purchasers in order that it might *insulate* itself from suit — because the "direct purchaser", its alter ego wholly-owned subsidiary, would not, of course, sue its parent.[21] In such a case, if the purchasers from the subsidiary could not sue, no one could sue, and the manufacturer would have evaded liability.[22] By contrast, the present case presents the reverse situation — plaintiffs were not collusive creations of Crown, nor willing creatures of Crown's dictates who could not have been expected to sue — in fact, they did seek to assert their pricing independence and did sue. Moreover, in the absence of the conspiracy, as the Court of Appeals found and as this Court held in *Hanover Shoe*, the prices plaintiffs would have charged cannot be known; they would not be expected to correspond to the fixed Crown formula.

The "controlled subsidiary" decisions follow from a footnote in *Illinois Brick*, 431 U.S. at 736, n. 16. This Court, having narrowly defined the sole exception to the pass-on rule of *Hanover Shoe* (the pre-existing fixed quantity cost-plus contract) added in the footnote that the "pass-on defense might be permitted . . . where the direct purchaser is owned or controlled by its customer." In *Sugar* and *Mid-West*, which involve a direct purchaser controlled by its *supplier*, the Court, arguing by analogy, developed this new pass-on exception. Its rationale, and its entire purpose (permitting the Court to ignore a wholly-owned subsidiary) is to avoid "evasion [of the antitrust laws]" by a "simple expedient." *Sugar*, 579 F.2d at 19; *Mid-West*, 596 F.2d at 589. The avoidance of such collusive

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[20] Not even in that petition, however, did Crown raise the other argument it appears to advance here that, because plaintiffs are victims of not one but two *per se* price-fixing violations, (since Crown also coerced its dealers to charge retail prices dictated by Crown), Crown may thus escape overcharge damage liability to plaintiffs. That argument is raised for the first time before this Court, and is discussed next.

The first two-thirds of Crown's 1979 "Petition for Rehearing" dealt only with the District Court's remand hearing. Plaintiffs enclose, in the Appendix to this Brief, those remaining pages from the Petition which dealt with the issue of damages (Res. App. C).

[21] "Reliance upon direct purchasers to bring suit is wholly unjustified when they are controlled by the prospective defendants." The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 230 (1977). Nor would the controlled subsidiary be expected to charge independent prices in the absence of a conspiracy. In either event, it would remain a creature of the parent and do its bidding.

[22] See *In Re Sugar Antitrust Litigation*, 579 F.2d 13, 18-19 (3d. Cir. 1978); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 563, 587-89 (3d Cir. 1979).

evasion by a manufacturer and its alter-ego subsidiary, by erecting a new exception under *Illinois Brick,* may or may not meet with this Court's approval, but that issue is not presented here. Here, the facts are precisely the opposite and argue against an exception: there was obviously no collusion between plaintiffs and Crown to insure that plaintiffs would not sue (and thus that no one could sue); the reverse is true.

The second prong of Crown's "collusion" argument, dealing with the presence of a vertical price-fixing conspiracy here, must fall under the same rationale. Indeed, the only Court of Appeals decision discussing the specific issue of whether the addition of a vertical price-fixing conspiracy to a case should bar direct purchasers from suing is understandably *not* cited by Crown. In that case, *In Re Beef Industry Antitrust Litigation,* 600 F.2d 1148 (5th Cir. 1979), Judge Wisdom's holding recognizes that, consistent with the collusive subsidiary exception cases, a vertical price-fixing exception to *Illinois Brick,* if meritorious at all, could not apply to *Phillips v. Crown.* Thus, in *Beef,* the indirect purchasers argued for standing to sue under a "co-conspirator" exception, if they could show that the "intermediary was an equal participant in the price-fixing conspiracy", and thus it would be barred from suing under the case law holding that "when parties of substantially equal economic strength mutually participate in the formation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other." 600 F.2d at 1161. This argument obviously bears no relevance to the present suit, where (a) the dealers' economic strength and bargaining power here has been held *de minimis* compared to their supplying companies, see *F.T.C. v. Texaco, Inc.,* 393 U.S. 223, 226-27 (1968); *Shell Oil Co. v. F.T.C.,* 360 F.2d 470, 487 (5th Cir. 1966), *cert. denied,* 385 U.S. 1002 (1967); see, *Phillips v. Crown,* 602 F.2d at 627 (Pet. App. A, p. 15a); 395 F. Supp. at 763 and 763 n. 16 (Pet. App. C, p. 87a); and 376 F. Supp. at 1256 (preliminary injunction); and (b) far from being willing and equal partners in an illegal scheme, bearing equal responsibility for the restraint of trade and thus perhaps barred from suing, the plaintiffs here were coerced to acquiesce in the price-fixing, which they fought unsuccessfully in the marketplace and successfully in the Courts.

In *Beef,* Judge Wisdom recognized that the rationale for any new exception under *Illinois Brick* (such as the controlled, collusive subsidiary exception), if any is permissable at all, would be the recognition that "reliance upon direct purchasers to bring suit is wholly unjustified when they are controlled by the prospective defendants." 600 F.2d at 1160, n. 16. The Fifth Circuit further recognized the rule that, under *Illinois Brick,* "courts should invoke the exception only to ensure that sellers do not insulate themselves from suit . . . by *strong-arming direct purchasers into choosing not to sue.*" 600 F.2d at 1162 (emphasis added). The reasoning of *Beef* is consistent with the reasoning in *Sugar* and *Mid-West,* but such issues are totally beside the point in *Phillips v. Crown.*[23]

Crown refers to the class action litigation which grew out of the *U.S. v. SIGMA* indictment, and the certification of several classes of purchasers. *In Re Independent Gasoline Antitrust Litigation,* 79 F.R.D. 552 (D. Md. 1978). In that case the Court conditionally certified (subject to decertification if the predictable problems of damage analysis were not overcome, 79 F.R.D. at 562) two classes of direct bulk purchasers from the oil companies (taxicab companies and motor vehicle dealers), two classes of credit card or charge purchasers (who purchased either directly from the oil companies which sold through company-operated stations, or from dealers, as in the case of Crown and Hess), and a class of independent service station dealers, who purchased from the conspiring oil companies.[24]

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[23] Judge Wisdom noted also (600 F.2d at 1163) that a case which had suggested the possible existence of a vertical price-fixing exception was *Donson Stores, Inc. v. American Bakeries Co.,* 58 F.R.D. 481 (S.D.N.Y. 1973). Crown, of course, never cited *Donson,* nor did it cite any other case on the issue of a vertical price-fixing "exception" until its present petition. In *Illinois Brick,* however, this Court cited and discussed *Donson* on another issue, 431 U.S. at 741, n. 24. If this Court wished to recognize such an exception, it could well have done so in *Illinois Brick.* In any event, as discussed, such an exception would have no relevance here.

Of dispositive significance here is the fact that, in its conditional certification opinion, the District Court expressly *declined* to rule on "the possible assertion of an *Illinois Brick* indirect purchaser defense", viewing such a question as premature, because it concerned "the merits of the actions, not whether they should be maintained as class actions." 79 F.R.D. at 560, n. 9.

On November 21, 1979, just prior to the filing of Crown's petition in this Court, defendant's counsel in the class actions notified the District Court that the actions had been settled (See Res. App. D). Thus, the class action certifications were not subjected to further analysis by the District Court (concerning the decertification motions by defendants, and a subsequent ruling on the merits of any *Illinois Brick* exclusion of indirect purchasers). Neither, of course, was the case subjected to appellate review by the

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[24] Plaintiffs' antitrust counsel in *Phillips v. Crown,* Frank, Bernstein, Conaway & Goldman, did not represent any plaintiffs in the class actions.

The Court in *Beef* noted also that, where the alleged "co-conspirator" middlemen were not named as parties-defendant in the class action, no exception to *Illinois Brick* should be permitted, because of the possibility of inconsistent adjudications. (The defendant-manufacturer should be able to prove in the same lawsuit that the middlemen were willing, collusive participants and equal partners, thus barring the middleman from suing. If such allegations were tried in two forums, the risk of inconsistent adjudications existed). 600 F.2d at 1163.

Fourth Circuit. It is, accordingly, pure speculation by Crown as to whether there could have been possible "duplicative" damage exposure in the class actions.[25]

It is noteworthy that whatever recovery was obtained in the settlement of the class action did not even approach "full compensation." There was no class of cash purchasers of gasoline, and, in its decision, the District Court recognized (even without reaching any *Illinois Brick* indirect purchaser issues) that *no* recovery would be possible by any such class, in view of the dearth of records and the impossibility of management of such a class. 78 F.R.D. at 562. Thus, whatever classes would ultimately have recovered if the class action had proceeded, the vast majority of motorists could never recover damages from the defendants flowing from a multi-state conspiracy.[26]

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[25] The District Court noted that, in opposing certification of the dealer class, the defendants (of which Crown was one) argued that dealers must show they were *coerced* (vertical price-fixing) in order to recover — a position inconsistent with Crown's position here. 78 F.R.D. at 560.

Apart from every other argument which has been discussed in this brief, it would be, to say the least, anomalous that the dealers in the class action achieved a measure of compensation, while the plaintiffs here (the dealers without whose efforts there could have been no "independent gasoline antitrust litigation") where denied their right to damages.

[26] The District Court, 78 F.R.D. at 562, n. 10, cited Judge Augelli's decision in *City of Philadelphia v. American Oil Co., et al.,* 53 F.R.D. 45, 71-72 (D.N.J. 1971) in which the Court refused certification of a class of cash purchasers. In the intervening years, the problems attendant to certification of such a class (even assuming the unlikely possibility that it could achieve standing) have not decreased. Cf. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974).

CONCLUSION

Phillips v. Crown is grounded in the basic principles of *Hanover Shoe* and *Illinois Brick*. As the Court of Appeals recognized, the complexities inherent in tracing what could have occurred in the absence of the price-fixing here are precisely those complexities, those speculations, and those unanswerable questions, the avoidance of which is the principle rationale for this Court's holdings in *Hanover Shoe* and *Illinois Brick*. See 431 U.S. at 725-26; see *id* at 730-733, 737, 740-42. Moreover, the second reason underlying these cases' establishment of an "automatic recovery of the full overcharge by the direct purchaser," *Illinois Brick,* 431 U.S. at 730; see Id. at 735, is the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws." 431 U.S. at 745. Few cases exemplify better than *Phillips v. Crown* the salutary nature of this Court's policy. In the course of a seven year battle, four service station dealers, direct purchasers with the incentive to sue and the fortitude to endure the fight, established not only a horizontal price-fixing conspiracy in the Baltimore market, but also exposed the existence of a conspiracy which spread across the Middle Atlantic states, thereby enabling the United States government to institute a successful criminal prosecution.

This Court should not grant *certiorari* in this case, where to do so would undermine the objectives sought and achieved by its previous decisions.

Respectfully submitted,

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January 25, 1980

APPENDIX A

United States Court of Appeals
For The Fourth Circuit

Nos. 77-1780 & 78-1078

(Filed September 6, 1979)

John T. Phillips, Jr., Corrado Frank Tumminello,
Charles Phillip Freitag, and Carroll
Charles Myers,

Plaintiffs-Appellees,

versus

Crown Central Petroleum Corporation,

Defendant-Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

Upon consideration of a motion of the appellant, by counsel, for stay of mandate pending application to the United States Supreme Court for a writ of Certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court — by Direction.

/s/ William K. Slate, II,
Clerk.

APPENDIX B

United States Court of Appeals
Fourth Circuit

TO ALL COUNSEL

POLICY STATEMENT

STAYS OF MANDATE

A mandate will not be stayed in any case except by order of the Court for good cause shown. To constitute "good cause shown" there must be a finding by a circuit judge that a substantial question is to be taken to the Supreme Court of the United States.

The original copy only of a motion for stay of the mandate need be filed; duplicate copies are not required.

WILLIAM K. SLATE, II,
Clerk.

Rev. 8/27/76

[EXCERPT] APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 77-1780, 78-1078

JOHN T. PHILLIPS, JR., CORRADO FRANK TUMMINELLO,
CHARLES PHILLIPS FREITAG, and CARROLL CHARLES MYERS,

Plaintiffs-Appellees,

v.

CROWN CENTRAL PETROLEUM CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APPELLANT'S PETITION FOR REHEARING, AND SUGGESTION FOR REHEARING EN BANC

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2. THE PANEL'S DECISION TO UPHOLD THE AWARD OF "HORIZONTAL DAMAGES" DIRECTLY CONFLICTS WITH ILLINOIS BRICK.

The rule of *Illinois Brick* is that the direct purchaser at the fixed price is entitled to recover the full amount of the overcharge and that no party at any other level of the manufacture or distribution chain can trace the overcharge to its level and claim an allocated portion of the overcharge. *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 at 728-29 (1977). That rule was violated here.

The panel recognized that the two damages theories adopted by the district court "are only loosely related to the facets of the conspiratorial scheme" (*Slip. Op.* 25) and reflect the district court's own confusion over the damages property attributable to the conspiracy found (*See* Slip. Op. 15, n.2). The panel reversed as to one theory — vertical damages — noting, *inter alia,* that the district court's methodology was "seriously flawed" and its assumptions were of "demonstrable falsity" (Slip Op., pp. 31-34). It approved the lower court's other theory that the true measure of plaintiffs' damages from the conspiracy was the portion of a retail overcharge that plaintiffs paid. This decision squarely conflicts with the Supreme Court's decision in *Illinois Brick.*

a. *Plaintiffs Were Not Direct Purchasers at the Fixed Price*

In *Illinois Brick*, the Supreme Court declared that "the overcharged direct purchaser, *and not others in the chain of manufacture or distribution,* is the party 'injured in his business or property' within the meaning of [Clayton Act Section 4]" (431 U.S. at 729). These direct purchasers at the fixed price are entitled to recover the full amount of the illegal overcharge, to the exclusion of all indirect parties (*Id.* at 724). Since the conspiracy in this case was found "to maintain retail prices above competitive levels" (Slip Op. 33, 8-14), the consumers were the direct purchasers at the fixed price and paid the full amount of any retail

price overcharge resulting from the conspiracy. Four consumer classes which [sic] been certified are suing for damages arising from alleged retail price fixing throughout the Middle Atlantic states, including Baltimore.[8] Independent Gasoline Antitrust Litigation, MDL Docket # 267 (D. Md.).

Sound policy considerations cited by the Supreme Court support the conclusion that retail purchasers at the allegedly fixed retail prices were injured and entitled to sue for damages (*See* 431 U.S. at 746). Conversely, as shown in Part b below, since plaintiffs were actually beneficiaries and not victims of any higher retail prices maintained because of the conspiracy, they have no right to compensation (*Id* at 735, 746).

b. *The "Horizontal Damages" Were Impermissibly Calculated From Assumed Increases in the Wholesale Prices Which Were Not Fixed By The Agreement*

The *Illinois Brick* rule should be applied here for the same reasons that caused the Supreme Court to enunciate it in the first place: at present the holding in this case creates the very evils the Supreme Court there sought to avoid.

In the *Illinois Brick* decision, the Court decided that persons other than the actual purchaser paying the price fixed by the agreement would not be allowed to trace the "overcharge" to other prices in the chain of distribution which may have been influenced by the fixed price. In particular, the Supreme Court held that a purchaser of a building could not claim that a fixed price for a component — concrete block — had been passed-on and increased the cost of the building to him (431 U.S. at 728-29). While this case does not involve a claim by someone to whom the increased charge was passed on and, instead, involves a claim by plaintiffs who were unable to obtain the benefit of the full increased charge that they are entitled to the remainder, exactly the same principle is applicable.

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[8] Consumers who suffer damages as a result of horizontal and vertical price fixing activities are entitled to recover under the antitrust laws. Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2329 (1979). Morever, plaintiffs originally brought this suit to prevent Crown from terminating their leases pursuant to the alleged price-fixing conspiracy. Crown is not here contending that plaintiffs are precluded from suing for injunctive relief. See Mid-West Paper Co. v. Continental Group, Inc., 596 F.2d 573, 598-95 (3rd Cir. 1979).

The *Hanover Shoe*[9] and Illinois Brick decisions do not relieve plaintiffs of the burden of proving injury and damage within the meaning of Section 4 of the Clayton Act. As the panel described the relationship between the fixed retail price and the wholesale price (Slip Op., p. 26) (emphasis supplied):

> Each increase in the retail price at the pump was divided between the dealer and Crown on a one-to-three basis. Thus, if there were an increase in the retail price of 1 cent a gallon, the dealers' gross profit margin was *increased* by ¼ of 1 cent, while Crown's wholesale price was increased ¾ of 1 cent. *Since the higher the price the wider the dealer's margin,* each dealer had a substantial incentive to comply with Crown's directions about retail prices, and there was no counter-incentive since there was general agreement that *maintenance of these prices did not cause a loss of retail sales.*

The very recitation of that relationship establishes that retail price increases resulted in higher profit margins for the dealers and no loss of sales — and that Plaintiffs suffered no injury as a result of retail price increases. The district court found there was "no evidence of . . . similar agreements to fix wholesale prices" to Crown dealers, including plaintiffs (App. 1454). Consequently, it is clear error to treat a theoretical wholesale overcharge calculated by plaintiffs' expert from a "retail price overcharge" as a substitute for the requirement that plaintiffs prove that they were damaged within the meaning of the antitrust laws.

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[9] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

c. *The Panel Opinion Exposes Crown to Duplicative Damages*

Under these circumstances, Crown is obviously being subjected to risks of duplicative recoveries if the panel's decision is permitted to stand. Under *Hanover Shoe* and *Illinois Brick*, if there were retail price fixing, Crown is clearly liable to consumers for the entire amount of the overcharge. If as the panel here has held, Crown is also liable to plaintiffs for ¾ of the retail overcharge, duplication has occurred. The Supreme Court has repeatedly recognized that defendants should not and will not be put in this position. *E.G., Illinois Brick, supra,* 431 U.S. at 730-31; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972).

The panel's opinion on damages flies in the face of virtually every important principle expressed by the Supreme Court in *Illinois Brick*. The panel opinion permits an overcharge recovery by plaintiffs who are not direct purchasers at the fixed price. It allows proof of these damages by a tracing *from* the direct purchaser at the fixed price, then denies to Crown the use of this same methodology defensively to demonstrate plaintiffs did not suffer damages. Finally, it ignores the inevitable consequence of its holding — duplicative recovery of damages.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that this petition for rehearing be granted, the case be considered *en banc*, and the judgment of the district court be reversed and the case be remanded for a new trial.

Respectfully submitted,

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Dated: July 20, 1979.

APPENDIX D

HOWREY & SIMON
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November 21, 1979

The Honorable C. Stanley Blair
United States District Court
for the District of Maryland
United States Court House
101 W. Lombard Street
Baltimore, Maryland 21201

Dear Judge Blair:

RE: Independent Gasoline Antitrust
Litigation; M.D.L. 267

This is to confirm that all parties to the above-captioned action have reached an agreement to settle all the cases consolidated for pretrial purposes under M.D.L. 267. Counsel for all parties have not only agreed upon a settlement amount but also have agreed in principle upon the major provisions of a formal Settlement Agreement.

Both plaintiffs' and defendants' counsel have had several meetings during the past several weeks and will meet again in the near future. We expect that all necessary papers will be presented to the Court for review and approval by mid-December, 1979.

Counsel request that all return dates on pending motions and Court orders be held in abeyance pending the filing of the settlement papers with the Court.

Thank you for your consideration.

Respectfully yours,

Ray S. Bolze

RSB/pep

cc: All Counsel of Record.

Supreme Court, U.S.
FILED
FEB 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-831

CROWN CENTRAL PETROLEUM CORPORATION
Petitioner

v.

JOHN T. PHILLIPS, JR., CORRADO FRANK TUMMINELLO, CHARLES PHILIP FREITAG, AND CARROLL CHARLES MYERS
Respondents

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-831

CROWN CENTRAL PETROLEUM CORPORATION
Petitioner

v.

JOHN T. PHILLIPS, JR., CORRADO FRANK TUMMINELLO,
CHARLES PHILIP FREITAG, AND CARROLL CHARLES MYERS
Respondents

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Crown's petition for certiorari demonstrated that review of this case is necessary because the court of appeals, faced with the common and recurrent situation of a retail price fixing conspiracy effectuated through resale price maintenance, failed to apply the rule this Court established in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968) : the party who pays the illegally fixed price, and thus the full amount of the overcharge, is the only party who may recover overcharge damages. Instead, the court of appeals held that parties who dealt directly with a co-conspirator could recover overcharge damages even though those parties, like respondents here, had not paid the illegally fixed price. This approach required a determination of the probable effect of the fixed retail price upon the unfixed wholesale price paid by respondents, allowing them to recover that portion of the retail overcharge which could be "traced back" to these wholesale prices (Pet. 5-6).

The court of appeals' holding simply cannot be squared with the admonition in *Illinois Brick* that only "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is a party 'injured in his business or property' . . ." and thereby entitled to recover the full amount of the overcharge. 431 U.S. at 729. Indeed, respondents do not even mention, much less seriously address, Crown's showing that the policy concerns this Court found controlling in *Illinois Brick*—avoiding the difficulties of tracing an overcharge through the distribution chain; preventing any possibility of inconsistent judgments; and encouraging private enforcement of the antitrust laws —equally compel a reversal of the court of appeals in this case (Pet. 12-14). Rather, respondents engage in an unnecessarily protracted discussion of facts relevant primarily to issues on which Crown did not seek certiorari (Opp. 5-19).* [1]

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* Respondents' opposition brief will be cited as "Opp.".

[1] Crown's petition is directed to the holding of the court of appeals on damages and concedes the facts as found in the court's opinion. Thus, Crown does not here challenge the finding that it conspired to stabilize retail prices, nor the finding that it conspired to stabilize retail prices, nor the finding that, in furtherance of that conspiracy, Crown controlled the retail prices which its dealers charged to their customers (Pet. 4-6; Opp. 10 and n.8). Nor does it dispute the details of the two-step process by which the lower courts awarded to respondents that portion of the overcharge in the retail prices that could be traced back to Crown's wholesale prices (Pet. 5-6; Opp. 14-15 and n.12).

Respondent's extensive recitation of irrelevant matters cannot, however, controvert the central fact behind Crown's argument here: The express finding of the district court that there was *no evidence* Crown "fix[ed] wholesale prices" pursuant to any illegal conspiracy or agreement (Pet. 4; Pet. App. C, p. 77, n.7). This fact underscores what respondents ignore—while the dealers dealt directly with Crown, they did not pay an illegally fixed price. Therefore, as the petition showed, respondents are not entitled to recover overcharge damages which are, at best, "traced back" from the retail to the wholesale prices.[2]

In an attempt to justify the court of appeals "privity" approach, respondents must assert that they were charged "the fixed price." So, respondents argue that because their retail prices were fixed pursuant to the conspiracy, their wholesale prices were also unlawfully fixed (Opp. 5, 14-15). Yet, the mere fact that, under Crown's unique method of pricing, its wholesale price to dealers was based on and thereby controlled by the retail prices (see Pet. App. A, pp. 26-27, 31-32; Opp. 14-15) does not make the wholesale price the unlawful "fixed price." If no predetermined relationship had existed between the illegal retail prices and the wholesale prices charged by Crown to its dealers, respondents would not, even under their own rationale, have been charged a "fixed price." But in that event, under the privity approach respondents support, no one could recover overcharge damages.

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[2] Respondents' initial argument, that Crown has changed its arguments "in accordance with perceived opportunities" (Opp. 20) is particularly misguided. The only issue before the Court was not present in this case until the court of appeals forged a justification for the award of overcharge damages from the combination of vertical and horizontal conspiracies (Pet. App. A, pp. 25-34). Respondents admit that the issue was promptly raised in Crown's petition for rehearing (Opp. 21-22; see Opp. App. C, pp. 2-8). Moreover, Crown's "only contention" before the court of appeals in 1978 (Opp. 21) is still its position; respondents are not entitled to overcharge damages but must show actual lost profits.

Moreover, the fact of injury and the amount of damages suffered by the dealers' customers are the same regardless of the relationship between retail prices and wholesale prices. The customers always pay the fixed retail prices and the concomitant overcharge as a result of the conspiracy. Accordingly, the existence of a predetermined relationship between the illegal retail prices and the wholesale prices cannot be the *sine qua non* of overcharge recovery by the dealers, and what Crown advocates here is application of the *Illinois Brick Rule*: He who paid the unlawfully fixed prices should recover the overcharge.

Respondents make no adequate response to Crown's demonstration that the court of appeals' holding has nullified the policy considerations on which the Court expressly based *Illinois Brick.* They further do not dispute that the effect of the retail overcharge had to be traced back to the wholesale prices charged the dealers (Pet. 12-13). Nor do they deny that since Crown was not allowed to use the same two-step tracing process to show that the dealers were not injured, and could not use it as a defense if faced with a suit by the dealers' customers in another court, the court of appeals' decision creates the very possibility of inconsistent judgments and multiple liability which *Illinois Brick* sought to avoid (Pet. 13).

Respondents also provide no serious basis for the invocation in their "Conclusion" that "the longstanding policy of encouraging private enforcement of the antitrust laws" (431 U.S. at 745) would be best served by awarding them overcharge damages (Opp. 28). The question before the Court is whether respondents are entitled to overcharge damages *in addition* to injunctive relief and *instead* of proving lost profits.[3] Significantly, despite their attempt to assume credit for the result in *U.S.* v. *SIGMA,* 1980-1 Trade Cas. ¶ 63,097 (4th Cir. 1979) (Opp. 1-2, 11-12) (in which Crown was acquitted), respondents do not contend that they filed this action having such "salutory" results because of the tantalizing prospect of overcharge damages. They also do not explain why they should be rewarded with a portion of the retail overcharge while their customers, who paid the retail overcharge, should be denied recovery entirely.[4] It is difficult to see how such a result furthers private enforcement of the antitrust laws, or any other policy underlying the *Illinois Brick* decision (Pet. 14-15).

Respondents' remaining substantive argument is predicated on the misconception that Crown seeks an exception to, rather than the application of, *Illinois Brick* to this case. Thus, respondents' attempt to distinguish the Third Circuit cases cited by Crown on the ground that the facts here do not fit the "controlled subsidiary" exception established there[5] (Opp. 22-24) is beside the point. Crown cited these cases to show that courts have interpreted and applied *Illinois Brick* to achieve results consistent with the decision's underlying policies (Pet. 10-12); this proposition is not disputed by respondents.

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[3] The right of a party who has not paid the fixed price to sue for an injunction against the price-fixer is by now well established. *E.g., Mid-West Paper Products Co.* v. *Continental Group, Inc.,* 596 F.2d 573, 589-94 (3d Cir. 1979). Moreover, recovery of lost profits should be permissible under *Illinois Brick* where the plaintiff is not claiming overcharge or pass-on damages. *See Dart Drug Corp.* v. *Corning Glass Works,* 1980-1 Trade Case. ¶ 63,126 at 77,629-31 (D. Md. 1979).

[4] It is no answer to say that not all the customers of Crown dealers have adequate proof of their purchases to recover damages (Opp. 27). Many of the customers, which include business entities, see *In re Independent Gasoline Antitrust Litigation,* 79 F.R.D. 552, 554-55 (D.Md. 1978), will be able to claim damages, and their right to recovery of the overcharge should not be denied solely because some other customers cannot claim damages.

The argument that *In re Beef Industry Antitrust Litigation,* 600 F.2d 1148 (5th Cir. 1979) ("*Beef*") should control the disposition of this case (Opp. 24-25) arises from the same misconception of Crown's position. *Beef* and a more recent district court case, *Dart Drug Corp.* v. *Corning Glass Works,* 1980-1 Trade Cas. ¶ 63,126 (D. Md. 1979) ("*Dart Drug*") both discuss the so-called "vertical conspiracy" exception to *Illinois Brick.* In each case, the plaintiffs dealt directly with middlemen who in turn dealt with the defendants. The plaintiffs alleged a conspiracy among the defendants to fix prices paid (*Beef*) or charged (*Dart Drug*) to the middlemen, and this fixing of prices was alleged to have had an effect on the prices to the plaintiffs. *See Beef,* 600 F.2d at 1154-55; *Dart Drug,* 1980-1 Trade Cas. ¶ 63,126 at 77,627. The court in each case rejected the argument that because an illegal vertical conspiracy existed between the middlemen and the defendants, the plaintiffs' claims were not barred by *Illinois Brick.* Both courts held that this "vertical conspiracy" exception only applies when the middlemen are also party to the suit, because otherwise

> the possibility of inconsistent adjudications on the issue of the existence of a vertical conspiracy leaves the defendants subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable.[6]

This reasoning points out the significant difference between *Beef* and *Dart Drug* on the one hand, and this case on the other. In this case, awarding overcharge damages only to the dealers' customers also removes any possibility of inconsistent verdicts, since Crown dealers obviously cannot recover overcharge damages for retail price fixing by challenging the existence of the vertical conspiracy. Thus, unlike *Beef* and *Dart Drug,* the potential for inconsistent judgments in this case is created entirely by the court of appeals' erroneous interpretation of *Illinois Brick.*

In *Beef* and *Dart Drug,* because the alleged price-fixing occurred at the level of the middlemen, not at the plaintiffs' level, the plaintiffs were forced to assert an exception to *Illinois Brick* to recover overcharge damages. In contrast, in this case respondents' customers were charged the illegal fixed price. Consequently, respondents' customers are entitled to recover overcharge damages under the rule of *Illinois Brick,* while it is respondents who, because they were not charged the illegal price, must establish that an exception exists in order to recover overcharge damages.[7]

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[5] *See Mid-West Paper Products Co.* v. *Continental Group, Inc.,* 596 F.2d 573, 589 (3d Cir. 1979); *In re Sugar Industry Antitrust Litigation,* 579 F.2d 13, 18-19 (3d Cir. 1978). Respondents do not discuss or distinguish the other cases cited by Crown with these decisions (Pet. 11).

[6] *Beef,* 600 F.2d at 1163; see *Dart Drug, supra,* at 77,632-33.

[7] Significantly, in the only case discussing a situation similar to that at issue here, *Gas-A-Tron of Arizona* v. *American Oil Co.,*

CONCLUSION

None of respondents' arguments rebut Crown's demonstration that the court of appeals' decision represents a departure from the rule of *Illinois Brick* and establishes an erroneous precedent in an important and recurrent factual context. For the reasons stated above and in the petition, Crown's Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

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1977-2 Trade Cas. ¶ 61,789 (D. Ariz. 1977), the court took the view that Crown is advocating here: proper *application* of *Illinois Brick* and *Hanover Shoe* mandates that the party who paid the fixed price recovers the overcharge, regardless of his position on the chain of distribution (1977-2 Trade Cas. ¶ 61,789 at 73,244-45). *See also Donsen Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 481, 485 (S.D.N.Y. 1973) (dictum).